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THE PURPOSES OF CRIMINAL PUNISHMENT*

I. The Nature of Punishment

The idea of punishment, and a sense of the need for it in certain circumstances, has probably existed as long as man himself. Human beings have a long childhood. For many years they remain dependent upon their parents for food and shelter. During this period they have to adapt to the customs and manners of the community to which they belong, and the more complex that community, the more numerous the rules of conduct they must learn to observe.

Now, every child learns how to conduct himself by a system of rewards and punishments. Thus, punishment has been the experience of every one of us, and of mankind in general, since time immemorial. It has entered deeply into our imagination, and we are used to the idea, and even to the expectation of it. It is not surprising that in time we have built a set of arguments to justify it. Not all of these stand up to rational examination. Some are very ancient and have profound psychological roots; others, more modern and sophisticated, are not necessarily sounder for that reason. And in any case, though some of the older arguments may be consciously rejected, they have a habit, like wolves in sheep's clothing, of showing through in unexpected places.

One view of fundamental importance and great antiquity is that the purpose of punishment is expiation. Many different strands of thought come together in this idea. On the one hand, the offender must atone for his crime with suffering. On the other, once the punishment has been inflicted, there is implicit in expiation the idea of a squaring of accounts. The crime has been "paid for" by the punishment, the slate is clean again. This principle of some sort of balance between crime and punishment occurs also in the doctrine of retribution, and it is often difficult to disentangle one concept from another. Even the oft-quoted *lex talionis* itself could justifiably be quoted within the context of expiation, not least

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because the real purpose of the law was to balance penalties—an eye for an eye, and a tooth for a tooth, and a life, yes, but only for a life.

It may even be said that atonement, in the Christian sense of repentance, has made penal reform possible. And certainly, once a crime has been paid for, and society feels that the account has been squared, there is a greater readiness to come to the offender's aid, a readiness which may have helped to bring about such voluntary bodies as the Discharged Prisoners' Aid Societies. Yet this positive result is sometimes counterbalanced by the negative effect which the belief in expiation has on some offenders. They come to feel that when they have served their sentence, the slate has been wiped clean and that they are therefore free to commit new offences.

This creed of some habitual old lags is reminiscent of the times when penances, originally exacted by the Church to effect a process of spiritual regeneration, deteriorated into indulgences which permitted a man to anticipate future sins by building up a treasury of good works, a sort of credit account against which forbidden pleasures might be balanced.

Finally, the idea of "purging" guilt, or sin, or crime, by suffering, is implicit in expiation. I may here refer to the sense of pollution which many primitive tribes feel if an offence against the gods has been perpetrated, and their fear of being contaminated. Purification through suffering is thus a most ancient belief and also occurs in various religions. In the Middle Ages, it was this belief that gave rise to some of the more sadistic practices tolerated by the Church, and it continues to be carried to extremes by certain sects who practise self-flagellation.

The idea that the element of expiation should deliberately enter punishment is today rejected by many. Sir Leo Page, in his *Crime and the Community*,[1] for example, roundly states that he believes it to be not only wrong but actively mischievous:

> "For be it once accepted that expiation is a *necessary* constituent of the punishment of the offender, then, whenever the courts of law found a defendant guilty of a legal offence, they would be bound to impose such a penalty as to cause him pain and suffering."

To do this would impose on courts the duty to determine the degree of pain precisely adequate to expiate moral guilt. That is patently impossible. To assess the *moral* culpability of a man involves the ability to look into his heart, to take account of the strength of the temptations to which he was subjected, as well as of the conditions which have made him what he is. Moreover, the theory of expiation rests upon the premise that it is man's duty to punish sin—a legacy from the times of taboo-breaking,

[1] *Crime and the Community*, Page (Sir Leo), p. 67.

when crime and sin were in fact synonymous. But now it is recognised that there are many sins which are not crimes, and equally that there are many legal offences which are not sins. The distinguished Italian criminologist Enrico Ferri [2] put the matter succinctly:

> "The question of the moral guilt of a criminal, or of any other human being, lies within the domain of religion and of moral philosophy . . . the State and its system of criminal justice can do no more than adopt such measures to defend the community against criminals as are reasonable in themselves, and proportionate to the danger threatened to society."

So much for expiation. Now I want to turn to another element in, or justification for, punishment—and that is retribution. It is, of course, linked with the concept of expiation, in that both expiation and retribution are to some extent concerned to restore a balance. However, whereas the account which is being squared when a crime is expiated is felt to be, first, a *moral* account, and secondly, an account *personal* to the offender (in that he has the opportunity to purge his guilt), with the notion of retribution the interests of the injured party enter into the balance. Retribution is revenge for an injury done. You hurt me, and I will hurt you. Indeed that is its literal meaning. And if I cannot hurt you myself, I demand that you should be hurt by others. The desire to make the offender suffer, not because it is good for him (as when guilt is purged by suffering), not because suffering might deter him from further crime, but simply because it is felt that he *deserves* to suffer, is the essence of retribution.

The desire to hurt the thing that hurt you is as old as mankind itself and can be shown to have existed throughout the history of punishment. It applies to animals and inanimate objects as well as to human beings. It is what makes us kick the table-leg on which we stub our toe. Seagle, in his *History of Law*, tells of the old Hebrew rule of stoning an ox to death if it killed a man. In ancient Athens, an axe which had injured a man could be tried, and if found guilty, punished by being hurled over the city boundary. According to Herodotus, Xerxes whipped the Hellespont with 300 lashes because a storm wrecked his bridge. Calvert [3] quotes a case in 1386, at Falaise, where a sow was "sentenced to be mangled in the head and forelegs and then hanged for having torn the face and arms of a child, and thus caused its death." And in 1685, the church bell of La Rochelle was whipped and buried in the earth for having assisted heretics.

Some progress in ideas has been made, but the doctrine of retribution was still roundly defended by eighteenth-century philosophers like Kant [4] who claimed that punishment was a

[2] Ferri (Enrico), *Criminal Responsibility*.
[3] Calvert (E. Roy), *The Lawbreaker*, p. 4.
[4] Kant (E.), *Metaphysik der Sitten*.

"categorical imperative" and declared that "punishment . . . must always be inflicted upon the offender *for the sole reason that he has committed a crime.*" In the nineteenth century, lawyers like Sir James Stephen [5] went even further:

> "It is highly desirable that criminals should be hated, that the punishment should be so contrived as to give expression to that hatred, and to justify it . . . by gratifying a healthy natural sentiment."

But "Vengeance is Mine," said the Lord. And that happens to be true. No man can escape the consequences of his action within himself. To allow feelings of hatred and revenge to enter into the consideration of what is a just punishment is to substitute passion for reason. "No punishment can undo what has been done," wrote Thomas Hill Green,[6] "or make good the wrong to the person who has suffered. What it can do is to make less likely the doing of a similar wrong." And philosophers from Socrates to Hobhouse have questioned whether the infliction of evil upon anyone can ever be in itself good.

Such arguments, together with the growing realisation that those who commit crimes are not always free agents but, to some extent at any rate, at the mercy of constitutional and environmental factors, have led to a gradual abandonment of the doctrine of retribution. The Home Office, in its Memorandum of Evidence to the Royal Commission on Capital Punishment, rejected it. It is not, they said, a principle which animates any proposal which emanates from the Home Office.

Sir Leo Page [7] goes further than that by declaring roundly that violence is the child of violence, and that useless punishment produces in the offender, not a spirit of meek contrition, but one of implacable hostility which, by making his reformation more difficult, injures not only him but the whole community. "We are driven irresistibly to the conclusion," he says—and here he quotes the great criminologist De Quiros [8]—"that the old notion of simple retribution, like extinct flora and fauna, has no place in our modern world."

However, although I do not feel that retribution is one of the true objects of punishment, I do not think that it will be easy, or even possible, to remove it from our thinking or feeling on punishment altogether. In so far as it implies an exact equation between the crime and its punishment, it is dangerous and must be resisted. "Equality between crime and punishment is a legal fiction," says Grünhut [9] quite rightly. It is arbitrary to fix six

[5] Quoted by Page (Sir Leo), *Crime and the Community*, pp. 70–71.
[6] Green (Thomas Hill), *Lectures on the Principles of Political Obligation.*
[7] Page (Sir Leo), *Crime and the Community*, p. 75.
[8] De Quiros, *New Theories of Punishment* (*Modern Criminal Science Series*) 1911.
[9] Grünhut (Max), *Penal Reform*, p. 4.

days, or six weeks, or six months, as the just sentence for stealing, say, an old raincoat worth 37s. 6d. But in the sense in which retribution implies that a criminal "deserves" his punishment, this feeling is connected with the notion of justice itself, of justice as an ultimate value, akin to the idea of truth, and closely connected with the principle of equality. A deserves his punishment, but B, if he has been harshly treated by the courts, *does not*, and it is the negative corollary of retribution which makes public opinion rally in B's favour.

I now turn to the question of deterrence. Here, for the first time, we are concerned with something that is aimed at the protection of society. By making a certain action a punishable offence, we expect that people will refrain from committing the offence through fear of punishment. However, the fact that people nevertheless continue to commit the offence is in itself a proof that deterrence does not act universally and on everyone alike.

The purpose of punishment as a deterrent is twofold: individual and general. The object is to teach the offender a lesson so that he will be deterred from repeating his offence; but it is also to demonstrate to the potential offender the consequences if he violates the law. Logically, it ought to follow that the more severe the punishment, the more certain the deterrent effect. Yet the whole history of penal law shows that severity of punishment did not curtail the volume of crime. In the time of Queen Elizabeth I, for instance, it was a capital offence to pick pockets. Yet the preamble of an Act of her reign (8 Eliz. c. 4) sets out that pickpockets were to be seen busily plying their trade amongst the crowds which gathered to watch the executions of other pickpockets who had been caught and condemned to die. Or again, evidence was given before the Royal Commission on Capital Punishment, 1866, that a chaplain of Bristol Gaol had found that out of 167 persons whom he had prepared for death, no fewer than 161 had actually witnessed an execution.

Finally, perhaps I might refer to the still widely held belief in the general deterrent powers of corporal punishment. The threat of a severe flogging, we are told from time to time, would deter thugs from committing robbery with violence. Such a belief shows the triumph of emotion over reason. When the Departmental Committee on Corporal Punishment [10] (which had made an exhaustive study of the subject, covering some 75 years) reported in 1938, they came to the following conclusion:

> "After examining all the available evidence, we have been unable to find any body of facts or figures showing that the introduction of a power of flogging has produced a decrease in the number of the offences for which it may be imposed, or

[10] Report of the Departmental Committee on Corporal Punishment. Cmd. 5684, 1938, Reprinted 1952.

> that offences for which flogging may be ordered have tended to increase when little use was made of the power to order a flogging, or to decrease when the power was exercised more frequently."

It was on the basis of this Report that judicial flogging was abolished, and it is not without interest to note that—far from robbery with violence increasing as a result of the abolition of flogging—there has, since then, been a fairly steady *decrease* in the incidence of that crime, in a time when other crimes of violence have increased.

The incidence of a particular crime in relation to a particular punishment will give some indication of the general deterrent power of punishment. As for individual deterrence, we can find out something of the effect of a particular punishment by looking at the after-histories of those who have been subjected to that punishment. If I may turn once more to corporal punishment, the Departmental Committee, to which I have already referred, analysed the careers of 440 men convicted of robbery with violence, and found that the subsequent careers of the men flogged over a ten-year period were worse than those of men not flogged. Their Report goes on to say that this result cannot be explained on the grounds that the men flogged were the more hardened offenders, as:

> " even among the first offenders, the subsequent record of those flogged was less satisfactory than that of those who were not flogged."

It is perhaps worth noting also that the effectiveness of punishment in controlling behaviour has been carefully tested with animals in the laboratory. The well-known American psychologist Ruth Strang, for instance, in her *Contributions of Research to Discipline and Control*, quotes eighty-eight laboratory studies which show that reward was almost universally effective in controlling behaviour, whereas in two cases out of every three, punishment had the opposite result of that intended.

But to return to human beings: the belief in the value of deterrence rests on the assumption that we are rational beings who always think before we act, and then base our actions on a careful calculation of the gains and losses involved. These assumptions, dear to many lawyers, have long since been abandoned in the social sciences. No economist would seriously maintain them today, and even to the uninformed the movements of shares on the stock exchange—where one might expect to see Bentham's principle of " enlightened self-interest " vindicated most clearly—demonstrate that men's actions are governed quite as much by fear or greed as by reason; and that the ability to ignore hard facts, and to see only what you want to see, is shared by a surprisingly large and influential section of the community.

Amongst criminals, foresight and prudent calculation is even more conspicuous by its absence. John Gittens, a very experienced

Headmaster of an Approved School, and also of a special Classifying School (which allows him to see a very wide range of young delinquents between the ages of eight and seventeen), has some pertinent remarks to make on the subject. In his "Approved School Boys" [11]—a Government publication issued by the Stationery Office—he underlines the boys'

> "inability to foresee the consequences of their actions. Most of the troubles that the boys get into are just like running one's head against a brick wall. In boys of a very low intelligence, this is sometimes the result of a genuine inability to look ahead and it may reach dramatic proportions—as with the boy *who pushed his hand through a pane of glass* to punch another boy."

Even though there is no consensus amongst doctors about the exact description of the so-called "psychopaths," experienced Prison Medical Officers, and for that matter, Prison Governors, are agreed that there is a type of prisoner who is quite incapable of foresight, who cannot learn even from the experience of punishment, much less from the threat of it. Yet other offenders, notably some sex-offenders (but also others subject to compulsive behaviour) are sometimes at the mercy of their impulses, and unable, without proper help and treatment, to control themselves adequately. Such persons are frequently in conflict, not only with society, but also with themselves.

This is not to say, however, that deterrence never works. On the contrary, it works very often. But it works less through fear of punishment itself, than through fear of social disapprobation. The majority of people need the approval of their fellow citizens. Consciously or unconsciously, we spend a good deal of time looking over our shoulder to those whose esteem we value. The Conservative looks to Conservatives, the Socialist to Socialists, the lawyer to lawyers, the husband to his wife; the criminal . . . ? Well, the criminal looks to other criminals. But the way to get prestige with other criminals is by being more daring in your criminal exploits, more persistent in pitting yourself against society and its rules. The boy who is sent to a Detention Centre for young toughs, there to submit to a short, sharp shock is often admired by other young delinquents; in *Low Company*, Mark Benney,[12] speaking with the authority of several convictions behind him, observes that a prison sentence is a "passport to the Underworld." Mere probation may not be very glamorous—but once a prison sentence is passed, you join a rather more select club. A stretch at Dartmoor, of course, makes you a real big-timer.

Another factor on which the effectiveness of deterrence depends is the certainty of conviction. But according to the latest official

[11] Gittens (John). *Approved School Boys.*
[12] Benney, M., *Low Company.*

Criminal Statistics, only 48 per cent. of the offences known to the police are "cleared up." Offences cleared up include those for which a person is arrested or summoned, or for which he is cautioned, those taken into consideration by a court when the offender is found guilty on another charge, and even some which are strongly suspected but which cannot be definitely cleared up; for instance, where the suspect dies, or commits suicide before the case has been tried. Even so, this still leaves an unknown quantity of offences which remain undetected altogether, so that the chances of your *not* being caught are distinctly better than those of your being apprehended and brought to trial. Add to this the fact that by no means all those who come before the courts are found guilty, and it is clear that the threat of punishment loses something of its persuasive force.

Yet the strength of the belief in the universal efficacy of deterrence is slow to diminish. We may no longer agree with the eighteenth-century judge who told the accused:

> "You are to be hanged not because you have stolen a sheep *but in order that others may not steal sheep.*"

But we still have the spectacle today of judges passing exemplary sentences in the expectation that greater severity will deter others, and diminish crime.

If the lessons of history are not regarded as conclusive, then it is time that we had some new and factual evidence on the deterrent power of punishment, and particularly about the selective manner in which it works. This was also the view which the Council of the British Medical Association expressed before the Royal Commission on Capital Punishment,[13] and which I now quote:

> "With the present degree of development of scientific study of the mind and conduct, science has taught us that human motivation is so complex, so often deep and semi-conscious or unconscious . . . that a really thorough scientific inquiry into the efficacy of the deterrent theory of punishment, which is so widely held today, might well bear good fruit, and possibly surprising results. The rather easy and facile assumption that the possibility of severe pains and penalties if a certain action is done is a powerful deterrent may well be proved to be not as valid as is so widely thought."

An opportunity to make some evaluation of the selective efficacy of deterrence occurred during the last war. The great Danish criminal lawyer and criminologist, Stephan Hurwitz, recounts in his well-known textbook *Criminology* how, in 1944, the Germans deported the Danish police. Consequently, the country was for some time without any effective police force.

The result was that there was a considerable increase in offences

[13] Royal Commission on Capital Punishment. Minutes of Evidence, 14th Day, British Medical Association, para. 4070, p. 332.

against property, but, significantly, no comparable increase either in murder or sexual crimes. This appears to confirm other evidence that greater certainty of detection and of punishment *does* deter many potential offenders, but that where strong passions or deep psychological motives are involved, the prospect of detection and punishment have relatively little effect.

This interesting Danish experience occurred during a world war, and at times when there was a universal shortage of consumer goods. This shortage was itself responsible for a good deal of law-breaking, and there were few countries during the war where the black market did not flourish. And if there were differences in the extent of black marketeering, this did not necessarily imply that, in the more law-abiding countries, police methods were fiercer. For the general incidence of crime in a particular country is much more a reflection of accepted moral standards, of the absence or presence of special frictions, pressures and temptations, and of morale in the widest sense, than of the efficacy of the police. In the last analysis, the reason why the average man does not commit murder, for instance, is not because he fears capital punishment—it is simply that to do such a deed is utterly repellent and outrages his moral feelings.

The prevention of crime involves wider issues than either severity of punishment or even certainty of detection. As for the latter, in democratic countries, we are loth to increase police forces beyond a certain point, or to give them more arbitrary powers of inquiry and arrest. There is little doubt that if the State supervised the individual much more closely, detection of offences would be more complete. But this result could be achieved only at a price which we are not prepared to pay.

To sum up: the limitations of deterrent punishment are fairly evident, though perhaps we need more scientific data on its selective efficacy. In general, however, it would seem that there is much crime, particularly of the sort which is based on disorders of the personality, on which it has little effect. It is therefore important to realise that there is evidence in this country of a growing amount of crime based on emotional disorders. Many experienced prison governors sigh for the thirties, when their charges were relatively straightforward people who merely succumbed to the pressure of poverty. And in another field the Annual Report of the Central After-Care Association has drawn attention to the changing type of offender. Mr. F. C. Foster, Director of Borstal After-Care,[14] for instance, remarks:

> "I have drawn attention in previous reports to the change in the type of boy being committed to Borstal and have said that the Borstal system is being asked to solve problems, physical and emotional, that were certainly not in the minds of its founders."

[14] Annual Report of the Council of the Central After-Care Association: 1955, p. 20.

Equally, the Vice-President of the Association of Headmasters of Approved Schools [15] has pointed out that the difficulties of many of the boys he has to deal with are

> "linked largely with a type of emotional complex not previously encountered."

The time has come, therefore, when, in considering the treatment of offenders, we need to move beyond the classical concepts of expiation, retribution and deterrence to something more positive: to the rehabilitation of the offender himself, and to the protection of society by measures specifically aimed at the prevention of a relapse into crime.

The movement in that direction—that is, in the direction of reform—began originally as a protest. It was a protest both against the physical conditions in prison, and against the moral and spiritual degeneration which took place *in* those conditions. And for a long time the twin objects of reformers remained the erection of clean prisons, decently and fairly administered, together with efforts directed at the prisoner to get him to abandon his evil way with the aid of religion and moral exhortation. At bottom, the offender was regarded as a free agent, able to control his conduct by making a straightforward moral choice between good and evil. Provided he was reasonably decently treated, and shown the errors of his way, it was expected that he would reform. Unfortunately results proved disappointing.

Today, it is in fact with the prisoner's social and psychological readjustment that modern penal reformers are concerned. Grünhut,[16] in his most valuable textbook on *Penal Reform*, puts the matter like this:

> "This conception of readjustment makes no presumptuous claims to produce a religious conversion or a moral rebirth . . . nor does it pretend to make a man a law-abiding citizen by a wise handling of his economic and social problems alone. The efforts are to be focussed on the man himself. . . . Penal and reformative treatment has taken over this outlook from social work. Constructive methods today owe much to the experience of social casework, and to a psychological insight into man's personal conflicts."

The modern probation service is the example *par excellence* of how this new attitude affects the treatment of offenders.

As you know, originally probation evolved from the conditional suspension of punishment, and the Probation of First Offenders Act of 1887 merely provided that an offender might be released on entering into recognisances to come up for judgment. The Probation of Offenders Act, 1907, added to this the element of personal supervision and created the Probation Service to do this job. Today, probation has evolved as a positive method of

[15] Annual Report of the Council of the Central After-Care Association: 1955, p. 20.
[16] Grünhut (Max), *Penal Reform*, p. 449.

treatment in its own right, and it is particularly the most recent developments of it that are interesting and relevant to our subject.

Until fairly recently, probation officers were much concerned with alleviating economic and social difficulties. Of course, economic difficulties loomed particularly large in the thirties, and the probation officers had to concentrate on this aspect. With the emergence of (more or less) full employment, however, the difficulties are often not so much in the environment as in the offender himself. The aim of probation officers today is not so much to change circumstances to fit the offender, as to help the offender to cope with circumstances effectively himself. The accent has shifted from the provision of material help to helping the offender to gain insight, to reorientate his feelings, to acquire a larger degree of self-control. In short, the purpose is to help offenders to lead lives more satisfying both to themselves and to others.

Perhaps I may be forgiven if, at this point, I quote at some length from an article written by a young woman probation officer [17] about the new type of training through which she had recently passed. The passage I propose to quote illustrates not only the value of this training but also the sort of task which probation officers now tackle:

> " First, we felt that our understanding of people had greatly increased. This did not mean that we thought ourselves better at casework than those workers who, by long experience or natural gifts of insight and sympathy, obtain gratifying results without having had the benefit of similar training, but rather that whereas previously we had dealt with problems, perhaps quite satisfactorily, on a hit-or-miss basis, now we could see more clearly what it was that we were attempting to do . . . it was illuminating to reflect on old cases and to realise that some which had seemed so incomprehensible, now assumed a recognisable pattern of cause and effect, and that behaviour which had maybe been dismissed as ' unco-operative ' stemmed from our own lack of perception as to the needs of that person and our inability to show true acceptance.
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> " Increased understanding of human motivations and personality structure led to a second gain, namely, an increase of self-awareness. The importance of self knowledge in casework has long been stressed, but perhaps it is only when it is personally experienced that its true value becomes apparent.
>
> " Thirdly, we acquired certain skills or techniques. I say this with hesitation, because such a statement is open to misinterpretation and these skills are, of course, possessed by a vast number of social workers who have had no form of casework training. We learned to become more observant, more sensitive in interviewing, more accepting of difficult clients, to record selectively and to adapt ourselves to different types of administrative procedure. We were taught to be systematic in casework so that while diagnosis and treatment in one sense

[17] Anon., *Probation*, Vol. 8, 1956.

began with the first contact, in another sense they were the outcome of careful study. We developed an appreciation of the value of different forms of treatment, ranging from material help to the giving of insight, and became more able to apply these appropriately."

In the institutional treatment of offenders, too, the same aims and the same spirit—specifically embodied in Rules 6 and 29 of the Prison Rules—is gradually beginning to make itself felt. And the introduction of psychiatric services, and of techniques such as group therapy, testify to the growing awareness on the part of the authorities that at the root of much criminal behaviour there are disorders of feeling and of emotions. Though little public mention is made of the fact, at least three prisons now have a full medico-therapeutic team comprising at least two, and in one case four, psychiatrists, a woman psychiatric social worker, a full-time psychologist, a psychological tester, and a social worker. These teams have had remarkable successes with cases considered utterly hopeless not long ago, though it must be underlined that the number of cases that can be dealt with is relatively small, that each case takes long and patient work, and that the treatment of certain categories of offenders still presents very considerable problems.

Of the techniques used, and of the future of institutional treatment, more will be said in a second article; but meanwhile I should like to quote, again at some length, the remarks of a very experienced woman psychiatric social worker [18] who has dealt with many hundreds of women prisoners and Borstal girls. She points out that in prisons we are concerned, not with the average kind of individual, but with

> "the inadequates, the misfits, and the aggressively anti-social. Nor are we training them for a specific and limited end. We aim at doing something far harder, at re-educating them so that they should live their lives a little more adequately and a little more responsibly; and any success is likely to involve them in radical changes in many other ways. For to think of a prisoner's problems just in terms of the crimes for which she has been sentenced is a very misleading simplification. Usually, her prison career is only one of the many factors that have to be taken into account, and the crimes she commits may be only a symptom, which, by itself, is of no greater diagnostic value than a fever would be in medicine. Very much more has to be known about how she functions as a person if rehabilitation is to be intelligently planned.
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> "Take, for instance, stealing, which brings more people into prison than any other crime. By itself, it tells us little about the person concerned, but we need to know a great deal more before offering help or advice—such as whether the impulse is habitual, or only in certain moods or in certain circumstances, whether it is a straightforward desire for the object taken or

[18] Tilley, M., *Howard Journal*, Vol. 9, No. 1, p. 43.

whether it represents an act of aggression or a symbolic seeking for something quite other than the actual object, or is a distraction from depression, or various other possibilities. Then there is the question of how far it seems to be part of the personality structure, the prisoner's own attitude towards it, what incentive she has to overcome it, what assets she seems to have that can be enlisted in the battle against it; and if there is not very much incentive, whether it is possible to arouse this in the form of some anxiety about what is happening to her, some desire to keep out of prison."

From all this, we see how, today, reform and the rehabilitation of the offender play an increasingly important part in the purpose of punishment. The sentence of the court is gradually beginning to reflect, not so much the indignation and anger of society (though this still happens frequently enough), but an attempt at diagnosis so that the punishment may be made to fit the criminal as well as the crime. The overriding aim here is the protection of society by serious and sustained attempts to prevent further relapses into crime. But coupled with this aim, there is another: the personal rehabilitation of the offender *for its own sake*. This is based on the absolute conviction that, in an age where sheer size and weight of numbers count for so much, and in the face of developments such as mass-communications, enormous industrial concerns employing tens of thousands, wars which destroy and cripple millions, every individual matters, however sick, however poor, however bad.

Already, concern for the weak members of society has borne fruit. In medicine, where so many are now cured who previously would have died or been disabled for life; in the social services, which afford some protection for the poor and old; and now in penal reform, where new methods of treatment are succeeding in turning anti-social persons into useful and effective members of society again.

But the evolution of new and better methods of treatment of offenders is not enough; it must be accompanied by a growing awareness, on the part of the courts, of the actual efficacy of the various methods available and for that we need a body of scientific knowledge regarding treatment results. At the moment there are very great variations in the sentencing policies of different courts, and a number of recent pieces of research have demonstrated the almost hit-or-miss methods which appear to be applied. But once sound and reliable information regarding the results of sentencing and treatment become more readily available, it will be possible for courts to pursue more rational policies, directed towards the protection of society and the rehabilitation of the individual offender.

Gerald Gardiner.*

(To be concluded)

* Q.C., one of the Benchers of the Inner Temple.

ILLEGALITY AND THE CONFLICT OF LAWS

A UNANIMOUS House of Lords (Lords Simonds, Reid, Cohen, Keith and Somervell) has affirmed the decision of the Court of Appeal in *Regazzoni* v. *K. C. Sethia, Ltd.*[1] It is, therefore, no longer useful to reopen the question, asked earlier in these pages,[2] whether English law has taken a dangerous or a desirable course. Rather it is necessary to inquire what it is that the House of Lords has laid down as a legal principle for the guidance of future generations.

The facts, it will be remembered, were of the utmost simplicity. Under a contract governed by English law the English seller agreed to sell to the Swiss buyer a quantity of Indian jute bags c.i.f. Genoa. The buyer intended, to the seller's knowledge, to reship the goods at Genoa to South Africa. Indian law prohibited the export of any goods which "are destined for" South Africa or "in respect of which the Chief Customs Officer is satisfied that the goods, although destined for a port or place outside the Union of South Africa, are intended to be taken to the Union of South Africa." Relying on this provision of Indian law the seller successfully contended that the contract was contrary to English public policy.

1. The House approved the decision of the Court of Appeal in *Foster* v. *Driscoll*,[3] "the correctness of which is not to be doubted."[4] The *ratio decidendi* of that case has been variously stated and the House has not reformulated it. One view of the decision is that an English contract is illegal and void "if the real object and intention of the parties necessitates them joining in an endeavour to perform in a foreign and friendly country some act which is illegal by the law of such country."[5] No rule so stated was referred to by the House. It would not have covered the point in issue, because the contract between the parties did not "necessitate" them "joining" in an act to be done "in" India. What was approved by Lord Reid[6] and Lord Keith[7] was the wider principle which was expressed by Lawrence L.J.[8] and according to which "a partnership formed for the main purpose of deriving profit from the commission of a criminal offence in a foreign and friendly country is illegal." Or, in the words of

[1] [1957] 3 All E.R. 286.
[2] (1956) 19 M.L.R. 523.
[3] [1929] 1 K.B. 470.
[4] [1957] 3 All E.R. 286, at p. 292, *per* Lord Simonds.
[5] [1929] 1 K.B. 470, at p. 521, *per* Sankey L.J.
[6] At p. 294.
[7] At p. 295.
[8] At p. 510.

Lord Somervell,[9] *Foster* v. *Driscoll* was a case of "a joint enterprise to import whisky into the United States": both parties to the contract (or their agents) were parties to the crime to be committed in the United States.

Whichever view of *Foster* v. *Driscoll* is adopted, the highest tribunal has given its blessing to a doctrine which is much stricter than that followed in other countries[10] but the moral foundation of which is such as to command general acceptance. Indeed, it is unlikely that the appellant assisted his case by questioning the propriety of a doctrine which is so much in harmony with the temper of the English judiciary in modern times. It was in a past age that Lord Wrenbury could say[11]: "Illegality according to the law of another country does not affect the merchant." At present, English law in certain cases demands, in the words of Lord Simonds,[12] "deference to international comity" and precludes any robust "assertion in favour of national interest to the prejudice of international comity."

The theoretical justification lies in public policy as understood by English law, not in international law. This was emphasised by Lord Reid.[13] Lord Keith's opinion that "the enforcement of the contract would give a just cause for complaint by the Government of India and would be contrary to our conceptions of international comity"[14] has, with respect, no foundation in international law.

2. The rule so established is, in all probability, not subject to any exception in case of the foreign law being of a penal, revenue or political character.

There never existed any judicial support for an exception in regard to penal and political laws. The House, it is true, did not in terms overrule some early cases in which a breach of foreign revenue laws had been held to be innocuous, for the Indian law in question clearly was not a revenue law at all[15] and in any event, as Lord Somervell rightly said,[16] "the courts of this country should not today enforce a contract to smuggle goods into or out of a foreign and friendly State." But the alleged exception is highly unlikely to be approved on a future occasion. As Lord Simonds put it,[17]

> "it does not follow from the fact that today the court will not enforce a revenue law at the suit of a foreign State that today it will enforce a contract which requires the doing of

[9] At p. 298.
[10] Mann, *The Legal Aspect of Money* (2nd ed., 1953), p. 362, note 2.
[11] *British & Foreign Marine Insurance* v. *Samuel Sanday & Co.* [1916] 1 A.C. 650, at p. 672.
[12] pp. 290, 291.
[13] p. 293.
[14] p. 295; a similar observation occurs already in the judgment of Lawrence L.J., above, note 8.
[15] p. 292, *per* Lord Simonds; p. 293, *per* Lord Reid; p. 296, *per* Lord Keith.
[16] p. 297.
[17] p. 292.

> an act in a foreign country which violates the revenue law of that country. The two things are not complementary or co-extensive."

This distinction between the enforcement and the recognition or application of foreign law commands full approval.[18] The alleged exception that revenue laws are not to be recognised or applied should at last disappear from our books.

3. If an exception in regard to contracts involving a breach of foreign, penal, revenue and political laws is not to be recognised, the serious problem arises whether we shall have to give effect to all foreign legislation of whatever type. In the modern world which has witnessed so much oppression and persecution an affirmative answer would have startling consequences. Many practitioners will agree that over the last twenty-five years the apparent rigidity of the principle of *Foster* v. *Driscoll*, *ubi supra*, forced them to express the fear that English courts might arrive at results wholly inconsistent with justice.

It is, therefore, welcome that the House of Lords has at least hinted at a solution which, however inelegant and shadowy it may as yet be, will probably afford some relief. Lord Simonds, it is true, admitted no more than that there might be exceptions: "The principle being based on public policy, exceptions to it must be similarly based."[19] But Lord Reid went further[20]—

> "It may be that there are exceptions. I can imagine a foreign law involving persecution of such a character that we would regard an agreement to break it as meritorious"

and Lord Somervell added[21]—

> "There may, of course, be laws, the enforcement of which would be against 'morals.' In such a case an exception might be made to the general principle."

The exception is inelegant in that it renders it necessary to beat a rule of public policy with the stick of public policy. This is bound to occur when once one enters the slippery road of public policy. "The spirits I have called—I cannot shake them off."

The question in what circumstances public policy may be invoked to justify the exception was not discussed by the House. All we know is that in the present case the application of Indian law could not be avoided. As Lord Reid said,[22]

> "it is impossible for a court in this country to set itself up as a judge of the rights and wrongs of a controversy between two friendly countries. We cannot judge the motives or the justifications of governments of other countries in these matters and, if we tried to do so, the consequences might seriously

[18] (1955) 40 *Transactions of the Grotius Society*, pp. 26, 27.
[19] p. 291.
[20] p. 294.
[21] p. 297.
[22] p. 294.

> prejudice international relations. By recognising this Indian law so that an agreement which involves a breach of that law within Indian territory is unenforceable we express no opinion whatever either favourable or adverse as to the policy which caused its enactment."

Or in Lord Keith's words,[23]

> "The Indian law is not a law repugnant to English conceptions of what may be regarded as within the ordinary field of legislation or administrative order even in this country. It is the illegality under the foreign law that is to be considered and not the effect of the foreign law on another country."

Accordingly, the only rule which can be deduced is the negative one, that it is not contrary to English public policy to apply the law of a foreign and friendly State, which, by its express terms, imposes an embargo upon the supply of goods to another foreign and friendly State.

This attitude adopted by English law towards a peaceful boycott may be contrasted with what presumably still is the British approach to contracts aimed at a blockade which is imposed by foreign belligerents in a war in which this country is neutral. Such contracts have repeatedly been held to be valid and effective, although their performance involved breaking the law of the belligerent States.[24] Another contrast is provided by the practice of the highest court of Switzerland, Holland and other countries in regard to decrees which in the course of the two world wars were issued in belligerent countries and directed against other belligerent States: neutrality was held to require the non-recognition of such legislation.[25]

From a purely formal point of view it can, of course, be argued that the House of Lords was not concerned with the effects of a state of war. But in view of the express terms of the Indian decree no verbal distinction can obliterate the fact that in substance the House was called upon to take sides in a dispute between two friendly States: If India would have had just cause for complaint about the enforcement of the contract, South Africa has no less just cause for complaint about its non-enforcement. That the House extricated itself from a dilemma by purporting not to see it is a remarkable feature of the decision. The result would perhaps be less unexpected if the contract had been subject to Indian law and

[23] p. 296.

[24] McNair, *Legal Effects of War* (3rd ed., 1948), p. 10, with further references and see, in particular, *Ex p. Chavasse, re Grazebrook* (1865) 34 L.J.(N.S.) Bank. 17.

[25] See Schnitzer, *Handbuch des Internationalen Privatrechts* (3rd ed., 1950), II, 684; Melchior, *Grundlagen des Deutschen Internationalen Privatrechts*, p. 80; as to Switzerland, in particular see the decisions of the Federal Tribunal, April 17, 1916, BGE 42 II 183; April 19, 1918, BGE 44 II 170; April 1, 1924, BGE 50 II 51, and the decisions of the Court of Appeal Zürich of November 11, 1942, *Schweizerische Juristenzeitung*, Vol. 39, p. 367; September 25, 1942, *Schweizerisches Jahrbuch fuer Internationales Recht* 1944, 232.

the proper law, therefore, had given force to the Indian decree in an English court. But the decision rests on the proposition that it was English public policy which positively *required* the enforcement of the Indian legislation expressly directed against South Africa. International comity as a head of public policy does seem to be a somewhat elusive conception.

4. There remains the last and, indeed, the crucial question of the case: when is a contract one that involves the violation of foreign law so as to bring it within the principle of *Foster* v. *Driscoll*?[26] Did the present contract fall within the category? What was it that tainted it with illegality?

The difficulty arises in this way: had the defendants not known of the plaintiff's intention to re-sell the goods to South Africa, the contract between the plaintiff and the defendants for delivery c.i.f. Genoa as well as the contract between the defendants and their Indian supplier for delivery c.i.f. Genoa would clearly have been valid. Why does the fact that the defendants knew about the plaintiff's ultimate intentions mean that the Indian supplier would necessarily violate Indian law and that, therefore, the contract between the plaintiff and the defendant was illegal?

In order to define this issue, as well as the scope of the decision, it is necessary to emphasise three points which emerge from a close analysis of the case.

First, it appears from the judgments in the lower courts (though not from the opinions delivered in the House of Lords, which deal with the facts somewhat cursorily) that nothing was known about the identity or the state of mind of the defendants' Indian supplier (if any) or the precise steps which the latter was required to take in India, nor was any correspondence with him or even a specimen of the export form to be completed by him available, the defendants having failed to disclose any documents or to give any evidence relating to their contract with any supplier. Hence, it must be, and apparently was, assumed that the Indian supplier did not share the knowledge of the parties to the action, but was under the impression that the goods were destined for Genoa. It followed that, had he performed a contract with the seller, the Indian supplier would not have violated Indian law in the sense that he would not have committed a criminal offence. Thus, Lord Simonds said[27] that "an Indian shipper would not be subject to any penalty if he could prove that he was unaware of the ultimate destination of the goods." Lord Reid referred to the parties' intention "to *evade* the Indian prohibition by finding a shipper in India who would not ask inconvenient questions."[28] And Lord Keith[29] imputed to

[26] [1929] 1 K.B. 470.
[27] p. 289. Whether the burden of proving ignorance really rests on the shipper is perhaps not free from doubt.
[28] p. 293 (italics supplied).
[29] p. 295 (italics supplied).

the parties no more than the knowledge and intention to carry out the contract "in circumstances which, *if all the facts were known to the Indian shipper*, would be a violation of Indian law. *Ex concessis*, these facts were not known to him."

Secondly, the defendants did not prove that they did, or had to do, anything in India apart from placing an order c.i.f. Genoa. In particular, it was not a necessary part of the transaction that the defendants would make, or cause to be made, any fraudulent statement in India or elsewhere. Professor Goodhart has suggested [30] that the defendant seller was expected to make some statement which to the knowledge of the buyer would have been untrue. No such fact is mentioned by the House of Lords. A court, it is true, is not called upon to define precisely what the seller had to do to achieve an illegal purpose, but, since in these matters a court cannot act on mere suspicion,[31] the House cannot have been satisfied that the seller would necessarily have to take some step which was not innocent. The defendants' failure to disclose all the facts to their Indian suppliers was rightly ignored by the House of Lords, for the proper law of the contract did not impose a duty of disclosure upon the defendants.

Thirdly, the defendants pleaded illegality. They did not plead supervenient impossibility by reason of the fact that the goods could not be exported from India or, more particularly, that the Indian Chief Customs Officer was satisfied that the goods were destined for South Africa, and therefore stopped the export. Lord Simonds seems to have thought [32] that if the Chief Customs Officer was so satisfied "the shipment inevitably falls within the prohibition and could only be carried out in violation of Indian law." Perhaps this observation would have been more relevant to a plea of frustration. For the purposes of the present case the attitude of the Chief Customs Officer could not be material, because he never came to be concerned with the transaction. If he had become concerned with it and had been satisfied with the declaration "Destination: Genoa," the shipper would have made a true statement.

In these circumstances the rule established by *Regazzoni's* case may be formulated as follows:—

> "A contract for the sale of goods is illegal if to the knowledge and intention of both buyer and seller the latter's supplier, in performing his contract with the seller, would act contrary to the law of his own country, it being irrelevant that he would not commit a criminal offence and that neither he nor the seller

[30] (1957) 73 L.Q.R. 32.

[31] Cheshire and Fifoot, *Law of Contracts* (3rd ed., 1952), p. 290. There is, of course, no doubt that Lord Simonds was right in stating (at p. 292) that "it is of no consequence that the documents did not disclose [the parties'] intention." It is difficult to understand how the contrary could ever be suggested.

[32] p. 289.

would have to make any statement known by them to be untrue."

Such a rule calls for four comments.

It goes far beyond any principle to be deduced from *Foster* v. *Driscoll*[33]: the importation of whisky into the United States necessarily involved committing a criminal offence in the United States, while in the present case no criminal offence was, or would have been, committed in India. Henceforth, therefore, it is the objective breach of the foreign law, intended by parties not subject to it, which brings the rule into operation and criminal liability in the foreign country is not one of its essential elements. Lord Simonds, Lord Reid and Lord Keith, it is true, expressed the view[34] that the wider principle laid down in *Foster* v. *Driscoll* and mentioned above "covered" the present case, but, with the greatest respect, this was in fact not so and is inconsistent with the basic assumptions rightly made by the House. Nor could the parties be said to be aiding and abetting the Indian supplier, since aiding and abetting presupposes a criminal act done by the principal.[35]

The evasion of a foreign law which, as Lord Reid clearly saw,[36] was in issue in the present case may in England be subject to stricter sanction than the evasion of English law. If English law included a general doctrine of *fraude à la loi*, then, indeed, there would have been ample room for its extension to foreign laws. In France such an extension is being favoured by some, although this is at present not the prevailing opinion according to which "la loi étrangère n'a pas, aux yeux du juge français, le caractère d'un impératif dont il aurait à défendre l'autorité comme il en a le devoir pour la loi française."[37] Are we witnessing the birth of a new doctrine of great potentiality?

In English law there is authority for the sound proposition that if a man employs an "innocent instrument" to effect a breach of the law intended by him, he cannot be in any better or other position than if he acted himself.[38] The reason is that a duty to obey the law is imposed upon him and he cannot shirk it by employing an "innocent instrument." In the present case the parties were not subject to Indian law, yet were, in effect, subjected to it, for the House of Lords made it incumbent upon them as a matter of English public policy to ensure the observance of the foreign law.

[33] *Supra.*

[34] At pp. 292, 294, 295.

[35] The words "aid and abet" are not in any event apt to describe what the parties did, since they would not have been present at the time of the commission of an offence. The words "counsel and procure" are appropriate to a person who, though absent, is an accessory before the fact.

[36] p. 293.

[37] Batiffol, *Droit International Privé* (2nd ed., 1955), section 374.

[38] *Edler* v. *Auerbach* [1950] 1 K.B. 359, at p. 370, *per* Devlin J.

The consequences of the rule for British trade in general and British insurance in particular will be far-reaching. It is tempting to illustrate them by examples which are likely to abound in the daily work of many practising lawyers. It must suffice to mention two cases of considerable practical importance. The law of Eastland prescribes a price of $x for deliveries of steel to Westland. The price is higher than that for steel delivered to other countries. No criminal liability is imposed for the innocent failure to charge the prescribed price. A in Westland contracts with B in Belgium for the delivery of Eastland steel c.i.f. Antwerp at less than $x. A knows that B will order the steel in Eastland; B knows that it will be transhipped to Westland. The contract provides for arbitration in England. It is illegal. Or under American law the sale of a certain English patent by its owner, the X corporation in New York, to Y Ltd., an English Company, is prohibited by American anti-trust legislation. Y Ltd. arranges with Z Ltd., another English company, that the latter should buy the patent from X Corporation who knows nothing about the intended resale to Y Ltd. Z Ltd. buys the patent, but since its contract with Y Ltd. is illegal, can retain it.

Perhaps it is not unlikely that *Regazzoni's* case will one day follow *Chapman* v. *Chapman* [39] and *British Transport Commission* v. *Gourley* [40] on the road to consideration by the Law Reform Committee.

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[39] [1954] A.C. 429.
[40] [1956] A.C. 185.
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PUBLIC BENEFIT IN CHARITIES

It has become a commonplace that a charity must, with one possible exception, be for the benefit of the public or a section of the public, but in recent years the application of this rule has given rise to a large number of problems for the courts have found considerable difficulty in deciding what exactly is the public or a section of the public for this purpose. And now a justification for a complete re-examination of the whole subject is to be found in the recent decision of the House of Lords in *I. R. C.* v. *Baddeley* [1] where, although the case was ultimately decided on other grounds, the judgments of their Lordships abound in dicta on this point. The object of this article, then, is to examine who or what is the public or a section of the public for the purposes of the law relating to charities.

Before turning in detail to this examination three preliminary questions require consideration. In the first place, to what extent is the law of public benefit common to the four traditional heads of charity, trusts for the relief of poverty, trusts for the promotion of education, trusts for the advancement of religion, and trusts for other purposes beneficial to the community? Secondly, must a trust for the benefit of a section of the community also benefit the public at large in order to qualify as a charity? And thirdly, does "the public" necessarily mean the public of the United Kingdom?

1. To What Extent is the Law of Public Benefit Common to the Four Heads of Charity?

As is well known the poverty cases stand apart, and if there is any requirement of public benefit in trusts for the relief of poverty it is certainly much less stringent than in other cases. But, leaving the poverty cases on one side, can it be said that the requirement of public benefit is the same in all other cases? Until recently it is probably true to say that most lawyers would have said that (apart from the poverty cases) a class of beneficiaries which could be regarded as a section of the public for one head of charity would be so regarded for all others. But there are thought-provoking dicta in *I. R. C.* v. *Baddeley* which suggest that this is probably not so.[2] Thus Lord Somervell said [3]:

[1] [1955] A.C. 572. For the effect of the Recreational Charities Bill, now before Parliament, see Postscript at p. 154, *post*.

[2] Actually the suggestion was first made by Lord Simonds in *Gilmour* v. *Coats* [1949] A.C. at 449.

[3] [1955] A.C. at 615.

> "I cannot accept the principle submitted by the respondents that a section of the public sufficient to support a valid trust in one category must as a matter of law be sufficient to support a trust in any other category. I think that difficulties are apt to arise if one seeks to consider the class apart from the particular nature of the charitable purpose. They are, in my opinion, interdependent. There might well be a valid trust for the promotion of religion benefiting a very small class. It would not at all follow that a recreation ground for the exclusive use of the same class would be a valid charity."

Thus, although a trust for the promotion of Methodist beliefs would clearly be charitable, a trust providing for some object under the fourth head of charity for the use of Methodists only would not necessarily be charitable. Indeed, in the *Baddeley* case Lord Somervell went so far as to say "that a trust to be valid under this head would normally be for the public or all members of the public who needed the help or facilities which the trust was to provide." There are similar dicta by Lord Simonds in the same case,[4] and although Lord Reid differed, it is submitted with great respect that the opinion of Lords Somervell and Simonds is to be preferred. In particular it is hard to disagree with Lord Somervell when he says that it is not possible to consider the class apart from the particular nature of the charitable purpose for the two questions are interdependent. This question will be reverted to later, but sufficient has now been said to justify treating of the necessity of public benefit under the four traditional heads separately, although the requirement of public benefit in some form is common to all cases except, perhaps, those involving poverty.[5]

2. Must a Trust for the Benefit of a Section of the Public also Benefit the Public at Large?

If a trust is for the benefit of a section of the community in a way which the law regards as charitable, will it nevertheless fail if it is not beneficial to the community at large? Of course in the vast majority of cases a trust for the direct benefit of a section of the community will usually be for the indirect benefit of the community at large, but it may occur that a trust for the benefit of a section of the public cannot, by any stretch of the imagination, be regarded as for the benefit of the public as a whole. The question has arisen in recent years as a result of decisions holding that age *per se* and impotence *per se*, without any element of poverty, are good charitable objects.[6] If this is so, the question has been asked,

[4] *Ibid.*, at 592.

[5] It follows from this that a gift for unspecified "charitable purposes" will fail despite the use of the word "charitable" unless it is for the benefit of a class of persons who can be regarded as a section of the community for any of the four types of charity: *Re Cox* [1955] A.C. 627.

[6] See *Re Glyn* [1950] 2 All E.R. 1150n; *Re Robinson* [1951] Ch. 198; *Re Lewis* [1955] Ch. 104.

may not trusts for the relief of "aged peers" or "impotent millionaires" be good charitable trusts?[7] The answer has been suggested to be in the negative on the ground that such a trust would not be for the benefit of the public,[8] but if it is conceded that peers or millionaires are a section of the community (a large concession) is this argument admissible? There is no clear case invalidating a trust admittedly for the benefit of a section of the public on the ground that it does not benefit the public at large. Moreover, the law is universally stated in the books and the cases to be that a charity must be "for the benefit of the community *or* of an appreciably important class of the community."[9] On the other hand, it must be confessed that some of the remarks in *Gilmour* v. *Coats*[10] (and they may well be part of the *ratio decidendi*) tend to support the suggestion that a trust for the benefit of a section of the community must also be for the benefit, indirectly, of the public at large if it is to be charitable. It will be recalled that in this case it was held by the House of Lords that a gift to a convent of nuns who devoted their lives to meditation and prayer without contact with the outside world was not charitable. The main ground of the decision was that any indirect benefit enuring to the public as a whole from the prayers or example of the nuns could not be taken into account by a court, the former because it was not susceptible of proof, and the latter because it was too vague and insubstantial. But it was also argued that the gift could be regarded as charitable on the ground that the nuns were themselves a section of the community inasmuch as the convent was open to any woman of the Roman Catholic faith who had the necessary vocation. This argument was rejected by their Lordships apparently on the ground that even if this were so the absence of any general benefit to the public at large was fatal to the gift.[11] Lord Simonds was quite specific on the point and he was also prepared to deny the charitable nature of a trust for the advancement of education "if it can be imagined that it was made a condition of a gift . . . that its beneficiaries should lead a cloistered life and communicate to no one, and leave no record of, the fruits of their study."[12] Even if these observations are merely *obiter dicta* it is submitted with great respect that they are clearly right, and they illustrate how difficult it is to be logically consistent in this branch of the law. It may, however, be possible to state the law in accordance with these views as follows: Every trust in order to be charitable must (with the exception of poverty cases) be either:

[7] R.E.M. in (1951) 67 L.Q.R. 164.
[8] R.E.M. in (1955) 71 L.Q.R. 16.
[9] *Per* Lord Wrenbury in *Verge* v. *Somerville* [1924] A.C. 496, at 499.
[10] [1949] A.C. 426.
[11] [1949] A.C. 449–450 and 462.
[12] At 450.

(1) For the direct benefit of the whole public in a way which the law regards as charitable, or

(2) For the direct benefit of a section of the community, *and* for the indirect benefit of the public at large. And in this event it is necessary that both the direct and the indirect benefit should be of a kind which the law regards as charitable.

Thus, by way of illustration, a trust for the promotion of the efficiency of the police force would be charitable as benefiting the whole public directly in a way which the law regards as charitable.[13] On the other hand, a trust for the provision of social and recreational facilities for the police force is not charitable because (1) it is not for the direct benefit of the whole public, such benefit as there is being merely incidental to the main objects; and (2) although it may be for the indirect benefit of the public in a way which the law regards as charitable (*viz.*, the promotion of the efficiency of the police) the direct benefit to the police, regarding them as a section of the community, is of a non-charitable nature, comprising purposes which are outside the scope of charity.[14]

3. Does "The Public" Necessarily Mean the United Kingdom Public?

It might have been thought that a trust for the benefit of the public or a section of the public of a foreign country could hardly claim the privileges of charities under the law of the United Kingdom. But although the House of Lords has recently held that a body of persons established outside the United Kingdom cannot claim to be exempt from income tax on the ground that its purposes are exclusively charitable,[15] the more general question remains. There are undoubtedly a number of authorities holding that a trust for the benefit of a foreign public may be charitable. Thus, in *Re Geck* [16] it was held that a trust for the poor in a certain town in Germany was a valid charity, and in *Re Robinson* [17] a trust for the relief of German soldiers disabled in the First World War was held by Maugham J. to be charitable. And the famous case of *Income Tax Commissioners* v. *Pemsel* [18] involved a trust for missionary purposes in heathen countries, the validity of which was upheld by the House of Lords. Moreover, it appears that if a testator, domiciled in England, leaves property by his will to trustees abroad for charitable purposes abroad the court may order the money to be retained and the income paid to the foreign

[13] *I. R. C.* v. *Glasgow Police Athletic Association* [1953] A.C. 380.
[14] *I. R. C.* v. *Glasgow Police* [1953] A.C. 380. It is important to note that it was not part of the *ratio decidendi* of this case that the police of a certain town could not be a section of the community.
[15] *Camille & Henry Dreyfus Foundation* v. *I. R. C.* [1956] A.C. 39.
[16] 69 L.T. 819.
[17] [1931] 2 Ch. 122.
[18] [1891] A.C. 531.

trustee subject to his rendering periodical accounts.[19] Alternatively the court may simply allow the trustee to have the property even if he is beyond the jurisdiction of the court.[20] Neither of these courses would be possible unless the courts were prepared to accept as charitable a trust for the benefit of a foreign public, or of a section of such a public.

Recently, however, in *Camille & Henry Dreyfus Foundation Inc.* v. *I. R. C.*[21] in the Court of Appeal, Evershed M.R. has attempted to rationalise some of the previous decisions as follows:

> "It may be that, on very broad and general grounds, relief of poverty or distress in any part of the world, or the advancement of the Christian religion in any part of the world, would be regarded as being for the benefit of the community in the United Kingdom. I see, however, formidable difficulties, where the objects of the trust were, say, the setting out of soldiers or the repair of bridges or causeways in a foreign country. To such cases the argument of public policy (meaning United Kingdom public policy) might be the answer."[22]

The Master of the Rolls then went on to refer to *Re Robinson*[17] as "a somewhat extreme case." It must be regarded as extremely doubtful whether such foreign trusts can really be regarded as charitable because they benefit the public of the United Kingdom, although one has considerable sympathy with the Master of the Rolls in his attempt to explain how such trusts ever came to be accepted as charitable.

We can now proceed to an examination of the meaning of "the public or a section of the public" in the four types of charity, with a preliminary word or two on trusts for the benefit of the public *simpliciter*.

Trusts for the public simpliciter

A trust for the public simply, without the addition of any objects to which the trust is directed, is charitable on the extremely technical ground that where a charitable object is not expressly excluded, it may be implied.[23] Thus, a gift for "my country England" has been held charitable,[24] and it has long been established that gifts for towns or parishes without any objects expressed are charitable.[25] There are a great many cases illustrating the fine distinctions between such cases and those in which some non-

[19] *Att.-Gen.* v. *Sturge*, 19 Beav. 597.
[20] *Per* Lord Brougham in *Mayor of Lyons* v. *East India Co.*, 1 Moo.P.C. 175, at 295, and *cf. Emery* v. *Hill* (1826) 1 Russ. 112 and cases there cited.
[21] [1954] Ch. 672. This point was not discussed when the case reached the H.L. [1956] A.C. 39.
[22] At p. 684, and *cf.* Jenkins L.J. at 704.
[23] *Williams' Trustees* v. *I. R. C.* [1947] A.C. 447, at 459.
[24] *Re Smith* [1932] 1 Ch. 153.
[25] See, *e.g.*, *West* v. *Knight* (1669) 1 Ch.Ca. 134, and *Att.-Gen.* v. *Webster*, L.R. 20 Eq. 483.

charitable object has been added to the gift or trust, thereby invalidating it, but these are irrelevant to the present purpose, and it is not proposed to consider them here.

Trusts for the relief of the aged, impotent and poor

(1) *The poor.* Although it is now usually stated that the poverty cases are an exception to the requirement of public benefit, this is probably an exaggeration. It is submitted that the true view is that, although benefit to the public or a section of the public is required even in these cases, yet a group of persons may be considered as a section of the public in the poverty cases which would not be so considered in other cases. Thus, as is well known, a trust for the education of the children of the employees of a certain company is not charitable because the class of beneficiaries cannot be considered as a section of the public in view of the personal nature of the connecting link between the members of the class.[26] On the other hand, it is now well established, at least as far as the Court of Appeal is concerned, that a trust for the relief of poverty among such a class of beneficiaries would be a good charitable trust.[27] But this does not mean that no public benefit at all is required in cases of poverty, for it is clear that a gift to named individuals, so far as is required to relieve their poverty, is not charitable. And though a gift for the testator's poor relations is charitable according to a number of anomalous but well-established cases,[28] yet a gift to a small and restricted number of the testator's poor relations is not charitable. Thus, in *Re Scarisbrick*[29] Jenkins L.J. said—

> "It is no doubt true that a gift or trust is not necessarily charitable as being in relief of poverty because the object or objects of it in order to take must be poor. Such a gift or trust may be no more than an ordinary gift to some particular individual limited to the amount required to relieve his or their necessities if in necessitous circumstances. One can conceive of a testator making a limited provision of this character for a child or children whose conduct in his view had reduced their claims on his bounty to a minimum. A disposition of that sort would obviously not be for the relief of poverty in the charitable sense. The same must be said of gifts to named persons if in needy circumstances, or to a narrow class of near relations, as, for example, to such of a testator's statutory next-of-kin as at his death shall be in needy circumstances."[30]

It is submitted that this involves saying that even a trust for the relief of poverty must be for the benefit of the public or a section

[26] *Oppenheim* v. *Tobacco Securities* [1951] A.C. 297, see *infra*.
[27] *Gibson* v. *South American Stores* [1950] Ch. 177, following *Re Sir Robert Laidlaw*, 1935, unreported.
[28] *Isaac* v. *De Froez* (1754) 2 Amb. 595; *White* v. *White* (1802) 7 Ves. 423; *Att.-Gen.* v. *Price* (1810) 17 Ves. 571.
[29] [1951] Ch. 622.
[30] At 650–651.

of the public, although the phrase "a section of the public" is here given a wider meaning than elsewhere in the law. Nor, it is suggested, can escape be sought, as has sometimes been done,[31] by saying that the relief of poverty is *per se* of indirect benefit to the community. Although indirect benefit is sometimes admissible it now seems clear that if the direct object of the trust is not charitable it cannot be saved because there is also some indirect benefit to the community at large.[32]

Although, therefore, the requirement of public benefit is not so strict in poverty cases as it is in others, it is by no means clear how far the law goes in this respect. Apart from the two exceptional types of case which have already been mentioned, *viz.*, the poor relations cases, and employees cases, the position is far from clear. But it has recently been held that the members of a club may be a section of the community in a poverty case.[33]

(2) *The aged and the impotent.* The main questions in regard to trusts for the relief of the aged and the impotent has not so much been the necessity for public benefit, but whether age *per se* or impotence *per se* without any element of poverty can be regarded as good charitable objects.[34] The reason for this is probably that the class of beneficiaries is, to a large extent, indicated in these cases (and this applies to the poverty cases too) by the very object of the charity itself. Thus, a trust for the advancement of education or religion does not, of itself, convey anything about the class of persons who are to be benefited. But a trust for the relief of poverty, or the aged, or the impotent, does tell us precisely who are to be the beneficiaries of the trust. Thus, there can be no doubt that a gift simply "to the poor" is charitable,[35] and so is a gift, *e.g.*, "to the blind."[36] A gift simply "to the aged" might raise difficulties on the ground of uncertainty, but a gift, say, "to old age pensioners" must be held charitable consistently with the Statute of Elizabeth, and with *Re Robinson*.[37] The only question in these cases, therefore, must be whether the class of poor, aged or impotent people to be benefited by the particular trust is wide enough or has been unduly restricted.

It has already been seen that in poverty cases the employees of a particular company (with or without ex-employees, and the families or dependants of employees and ex-employees) are a sufficiently wide class of the public for a trust for their benefit to be charitable. It is not clear at the present day how far this privilege extends to trusts for the aged or impotent, but in *Re*

[31] As in *Re Compton* [1945] Ch. 123, at 139.
[32] *I. R. C.* v. *Glasgow Police* [1953] A.C. 380, *supra*.
[33] *Re Young* [1955] 1 W.L.R. 1269.
[34] *Re Glyn* [1950] 2 All E.R. 1150n; *Re Robinson* [1951] Ch. 198; *Re Lewis* [1955] Ch. 104.
[35] *Att.-Gen.* v. *Rance* cited in *Att.-Gen.* v. *Clarke*, Amb. 422.
[36] *Re Fraser* (1883) 22 Ch.D. 827; *Re Lewis* [1955] Ch. 104.
[37] [1951] Ch. 198.

Gosling [38] it was held that a gift to form a pension fund for old and worn out clerks in the employment of a certain firm was charitable. If this case has survived *Oppenheim* v. *Tobacco Securities* [39] it places age and poverty on the same footing as regards public benefit. But impotence, at all events, does not seem to be accorded the same leniency, for in *Re Hoburn Aero Components* [40] the Court of Appeal held that a trust for the relief of air raid distress among the employees of a certain company was not charitable, as it was not for the benefit of a sufficient section of the public. Yet the court conceded that the relief of air raid distress was a good charitable object, presumably as being analogous to impotence.[41]

As in the case of all other charitable trusts, a restriction on the class of beneficiaries by reference to some geographical area will not prevent the class constituting a section of the public. Thus, a gift to the poor in a certain town or parish is clearly charitable,[42] and so also is a trust for the relief of distress in a particular area.[43] And it has even been held that a gift to provide coal for poor inhabitants in a village with a population of under four hundred is charitable.[44] But there is now authority for the view that if the area is narrowed down too much, as for example for the poor in a single street, the class of beneficiaries cannot be regarded as a section of the public for this purpose.[45]

Trusts for the promotion of education

A trust for the advancement of education may either take the form of a trust for the establishment or maintenance of an educational institution, or a trust for the education of certain persons who qualify to be selected according to the terms of the trust. In the former case the trust is for the benefit of the public as a whole and in the latter case it is for the benefit of a section of the public. Thus, it has been held that Zoological gardens are charitable institutions on the ground that they are educational,[46] and in this case clearly the institution is for the benefit of the public at large. Similarly, the Royal College of Surgeons has been held by the House of Lords to be charitable on the ground that, its objects

[38] 48 W.R. 300.
[39] [1951] A.C. 297, *supra*.
[40] [1946] Ch. 194.
[41] Although trusts for the relief of distress have usually been treated as charitable in their own right, as it were, it is submitted that distress must be regarded as analogous to impotence if it is to be regarded as coming within the Statute of Elizabeth.
[42] *Att.-Gen.* v. *Clarke*, Amb. 422; *Att.-Gen.* v. *Corporation of Exeter* (1827) 3 Russ. 395.
[43] *Re N. Devon Relief Fund* [1953] 1 W.L.R. 1260.
[44] *Re Monk* [1927] 2 Ch. 197.
[45] See Lord Simonds in *I. R. C.* v. *Baddeley* [1955] A.C. at 591, and *cf. Browne* v. *King*, 17 L.R.Ir. 448 (gift for children of tenants on a certain estate not charitable) but see *Re Christchurch Enclosure Act*, 38 Ch.D. 520, affirmed [1893] A.C. 1 *sub nom. Att.-Gen.* v. *Meyrick*.
[46] *Re Lopes* [1931] 2 Ch. 130.

being the promotion of the art and science of surgery, it is an institution for the advancement of learning and clearly for the benefit of the public at large.[47] Where the objects of a trust are thus for the benefit of the public at large, the fact that the trust incidentally confers benefits on certain individuals does not prevent it being charitable.[48] On the other hand, where it is actually an object of the trust to confer benefits on private individuals, albeit a subsidiary object, the trust is not charitable.[49]

The leading case on the requirement of public benefit in trusts for the promotion of education for the benefit of a section of the community is now *Oppenheim* v. *Tobacco Securities*[50] where the House of Lords held, in approval of the Court of Appeal's decision of *Re Compton*,[51] that a trust for the education of the children of the employees of a certain company, however numerous, was not charitable. Lord Simonds said:

> "These words 'section of the community' have no special sanctity, but they conveniently indicate first that the possible (I emphasise the word 'possible') beneficiaries must not be numerically negligible, and secondly, that the quality which distinguishes them from other members of the community, so that they form by themselves a section of it, must be a quality which does not depend on their relationship to a particular individual."[52]

Thus, a trust for the benefit of the descendants of a certain person or of several named persons is not charitable unless it is for the relief of poverty.[53] But in *Re Tree*[54] it was held that a trust for the benefit of the residents of a certain borough in 1880, or for the descendants of such persons, was a trust for the benefit of a section of the community, and, as the object was charitable, was a good charitable trust. It appears from this case that some confusion has been caused by the references in *Re Compton*,[53] *Re Hoburn Aero Components*[55] and *Oppenheim* v. *Tobacco Securities*[56] to "personal" and "impersonal" factors. Thus, in the *Oppenheim* case Lord MacDermott, dissenting, thought that many classes of people connected by personal factors could be regarded as a section of the community. "After all," he said,[57] "what is more personal than poverty or blindness or ignorance? Yet none would deny that a gift for the education of the children of the poor or blind

[47] *Royal College of Surgeons* v. *National Provincial Bank* [1952] A.C. 631.
[48] *Ibid.*
[49] *I. R. C.* v. *Glasgow Police* [1953] A.C. 380, *supra*; *Oxford Group* v. *I. R. C.* [1949] 2 All E.R. 537.
[50] [1951] A.C. 297.
[51] [1945] Ch. 123.
[52] At 306.
[53] *Re Compton* [1945] Ch. 123.
[54] [1945] Ch. 325.
[55] [1946] Ch. 194.
[56] [1951] A.C. 297.
[57] [1951] A.C. at 317.

was charitable. . . ." And in *Re Tree*[54] Evershed J. seems to have been troubled by the same difficulties. But it is submitted that this is due to a misconception of the test Lord Greene was laying down in *Re Compton*.[53] The true view, it is suggested, is not that the distinguishing quality of the individual members of the class must not be a personal one, for, as Lord MacDermott pointed out, nothing is more personal than ignorance or blindness. What must not be personal, if the gift is to be charitable, is the nature of the link between the various members of the class. Thus, the descendants of a named propositus, or the employees of a certain company, are connected, the one to the others, by virtue of their relationship with a named person or company, in other words, by a personal link. But the members of a class consisting of the blind, or the poor, are connected with each other by reason of their disability. Although the quality may be a personal one, the link between the members of the class is an impersonal one.

It is for this reason that a trust for persons following a particular trade or profession is for the benefit of a section of the community.[58] For, although the fact that a particular individual follows a particular trade or profession is a personal quality of that individual, yet the link connecting him with other members of the same trade or profession is an impersonal one. Although the validity of such a trust appears to have been conceded by the House of Lords in the *Oppenheim* case[59] difficulties may well arise, as was pointed out in that case, where all the members of a certain trade or profession are employed by the same person, such as the National Coal Board or the British Transport Commission. Thus is it to be said that a trust for the benefit of railwaymen is charitable, while a trust for the benefit of employees of the British Transport Commission is not? The difficulty becomes more acute when it is recalled that the class of beneficiaries may be restricted by reference to a geographical area without depriving them of their public character. Thus, a trust for the education of the children of all members of a certain profession in a certain town would be charitable. In this way a valid charity may easily be created in which the number of potential beneficiaries may be far less than the 110,000 persons involved in the *Oppenheim* case.[59] It is submitted that, should a case arise in which all the members of a profession are employed by the same person, the trust should be held charitable irrespective of the form in which it is created. This conclusion can be justified on the simple ground that a class of beneficiaries connected by an impersonal link is nonetheless a

[58] *Hall* v. *Derby Sanitary Authority* (1885) 16 Q.B.D. 163, approved in the *Oppenheim* case.

[59] [1951] A.C. 297.

section of the public because its members are also connected by a personal link.[60]

Where there is a charitable trust for the benefit of a section of the community the trust is not invalidated because the trustees are directed to give preference to certain beneficiaries who would not by themselves have constituted a section of the community. This proposition seems deducible from *Re Koettgen's Will Trusts* [61] although it must be confessed that this case opens the way to serious evasion of the *Oppenheim* ruling. The trust here was for the promotion of commercial education, and the beneficiaries were to be British born subjects of insufficient means to educate themselves, but the trustees were directed to give preference in the selection of individual beneficiaries to the employees of a certain company provided that not more than 75 per cent. of the income was to be devoted to the preferred beneficiaries in any one year. This was held by Upjohn J. to be a good charitable trust. The decision may, perhaps, be supported by the analogy of the Founders Kin cases which were apparently approved by the House of Lords in the *Oppenheim* case. These cases hold that a gift to a college or school on trust to provide scholarships is charitable despite a direction that preference is to be shown to relations or kin of the donor.[62]

It has already been mentioned that the inhabitants of a particular area constitute a section of the community for educational charities. Perhaps by analogy it has long been held that university scholarships which are open only to persons coming from a certain school are also charitable, although it might well be argued that the connecting link in such a case is a personal one. As Lord Normand said in the *Oppenheim* case, "It is not obvious *a priori* that a trust for the education of persons having the common qualification that they have already had part of their education at a named school is public. Yet there is no doubt that such trusts are public charitable trusts and are among the most securely established charitable trusts known to the law." [63]

An association such as the Boy Scouts, which is open to all boys of a certain age, and has educational objects, is valid as an educational charity.[64] In this connection it must be said that it is not possible to accept as universally applicable the dictum of Lord Thankerton in *Keren Kayemeth Le Jisroel, Ltd.* v. *I. R. C.*[65] that "'community' predicates the existence of some political or economic body settled in a particular area, and that the trust must be for that political or economic unit or a particular class

[60] *Re Tree* [1945] Ch. 325.
[61] [1954] Ch. 252.
[62] See, *e.g.*, *Re Lavelle* [1914] 1 I.R. 194—an extreme case.
[63] [1951] A.C. at 309.
[64] *Re Webber* [1954] 1 W.L.R. 1500.
[65] [1932] A.C. 650, at 660.

within that political or economic unit." If this is correct it would appear to confine the term " section of the community " to persons living in a definite geographical area, or a class of such inhabitants. This certainly is not the case with regard to religious charities, and it seems equally inapplicable to educational charities.

The question has been raised in recent cases whether, in regard to charities of the fourth type, a " class within a class " can be a sufficient section of the community, and it has been said, for example, that a trust for the benefit of Welsh people in London, or for the benefit of Methodists in the town of B, would not be for the benefit of the public or a section of the public.[66] But whether or not this is correct as to charities under the fourth head, it seems too late in the day to apply such a restrictive view of the law to educational charities. So long as the number of potential beneficiaries is not numerically negligible, and the connecting link between them is not a personal one, it would appear that a class is sufficiently wide to be a section of the community. Thus, a trust for the education of the children of, say, doctors, or lawyers, in a certain town, would almost certainly be held charitable.

Trusts for the advancement of religion

As in the case of educational charities, a trust for the advancement of religion may either be charitable as benefiting the whole community, or as benefiting a section of it. Thus, a trust for the promotion of a particular sect, or of a particular religion, is charitable on the assumption that it is of benefit to the public at large. It must be remembered that we are not here dealing with the question how far it must be shown that a trust for the promotion of religion is actually beneficial to the public,[67] but only with the question, what constitutes the public or a section of the public. And for this purpose it is clear that a trust for the promotion of religion generally, if beneficial at all, is for the benefit of the whole public and therefore charitable.

A trust for the endowment of a minister, or ministers, is also charitable as benefiting the whole public indirectly through the promotion of religious beliefs.[68] On the other hand, a trust for the benefit of a group of cloistered nuns who devote their lives to meditation and prayer is not charitable, because, first, even if the nuns themselves form a sufficient section of the community the trust does not benefit the public at large, and secondly, the law cannot give any weight to any indirect benefit which may enure to the public at large from the prayers or the example of the nuns.[69]

[66] *Per* Lord Simonds, *obiter*, in *Williams' Trustees* v. *I. R. C.* [1947] A.C. at 458, and in *I. R. C.* v. *Baddeley* [1955] A.C. at 590–593.
[67] On this point see *Gilmour* v. *Coats* [1949] A.C. 426.
[68] *e.g.*, *Lloyd* v. *Spillet*, 2 Atk. 148; *Att.-Gen.* v. *Cock*, 2 Ves. 273.
[69] *Gilmour* v. *Coats*, *supra*.

Similarly, a trust for the repair of churches is a good charitable trust, the purpose being expressly referred to in the Statute of Elizabeth I, and the trust being for the benefit of the public as a whole, or at least for the benefit of the inhabitants of the parish in which the church is situated.[70]

The question of public benefit in religious trusts need not detain us further because there is rarely any difficulty as to what is a section of the community in such cases. The gift is usually either for the direct benefit of the public at large, or for the benefit of the inhabitants of a certain area who clearly constitute a section of the community, or for the benefit of the adherents of a particular faith who also constitute a section of the community.

Trusts for other purposes beneficial to the community

It is not proposed to deal with the problem of public benefit in every charity of the fourth class, but only in those cases which give rise to special difficulty in this connection.

Objects of general public utility

Where a charity is of general public utility, that is to say, where it is just as capable of being enjoyed and used by the public at large as by a section of the public, then its use must, in fact, be unrestricted. This is clearly laid down in the dicta of Lord Simonds and Lord Somervell in *I. R. C.* v. *Baddeley*[71] which have already been referred to. It is here especially that attention must be paid to Lord Somervell's warning against considering the question of public benefit without bearing in mind the precise nature of the particular charitable purpose. Reference should also be made to some remarks of Lord Simonds:

> "The difficulty has sometimes been increased by failing to observe the distinction . . . between a form of relief extended to the whole community, yet by its very nature advantageous only to the few, and a form of relief afforded to a selected few out of a larger number equally willing and able to take advantage of it.
>
> ". . . For example, a bridge which is available for all the public may undoubtedly be a charity and it is indifferent how many people use it. But confine its use to a selected number of persons, however numerous and important: it is then clearly not a charity. It is not of general public utility, for it does not serve the public purpose which its nature qualifies it to serve."[72]

One may entirely agree with this view as regards trusts for objects of general public utility, of a kind which can equally serve the whole public as a section of the public, such as bridges, highways

[70] *e.g.*, *Re Palatine Estate Charity* (1888) 39 Ch.D. 54.
[71] [1955] A.C. 572.
[72] At 592.

or parks. But one may, with all respect to Lords Simonds and Somervell, have doubts whether such a rule can be laid down with regard to trusts for purposes which may much more effectively serve a limited section of the community than the whole community. For example, a community centre whose object is to provide recreation may not be large enough to cater for any member of the public who would care to make use of its facilities, while it may yet provide satisfactory facilities for a limited number of persons. If the objects are charitable (and recreation is such) and the persons permitted to use them are a section of the community and not a group of private individuals, it is hard to see why the charitable nature of the trusts should be denied. It is to be noted that the *Baddeley* case does not actually decide this point, for the discussion was *obiter* and Lord Reid took a different view from Lords Simonds and Somervell, while Lords Tucker and Porter reserved their opinions on this question.

Promotion of the efficiency of the Army or Police

A trust for the promotion of the efficiency of the armed forces, or the police force, is charitable, because the object is within the spirit of the Statute of Elizabeth I [73] and it is for the benefit of the public at large. But, as has already been seen, a trust whose primary object is to benefit (in a non-charitable way) the army or the police or a section of them is not charitable merely because it also incidentally promotes the efficiency of those bodies.[74]

Animal cases

It is well established that a trust for the benefit of animals may be charitable if it is not contrary to the public interest,[75] but it is hard to avoid the conclusion that such charities are anomalous in at least two important respects. In the first place, a trust, in order to be charitable, must not only benefit the community but also come within the spirit or intendment of the Statute of Elizabeth I,[76] and however benevolent a construction is put on the Statute it is impossible to conjure out of it any reference to animals. With this, however, this article is not concerned. But charitable trusts for the benefit of animals are also anomalous in

[73] Although this is now well established it appears to be due to a misreading of the Statute. The relevant part includes as charitable "the aid or ease of any poor inhabitants concerning payment of fifteens, setting out of soldiers and other taxes," etc. Thus, it is not the actual "setting out of soldiers" which is included, but the relief of people unable to pay taxes for the "setting out of soldiers."

[74] *I. R. C.* v. *Glasgow Police* [1953] A.C. 380, *supra.*

[75] *Re Wedgwood* [1915] 1 Ch. 113; *Re Douglas*, 35 Ch.D. 472; *Swifte* v. *Att.-Gen. for Ireland* [1912] 1 I.R. 133; but vivisection is in the public interest, so the Anti-Vivisection Society is not charitable: *Nat. Anti-Vivisection Society* v. *I. R. C.* [1948] A.C. 31. And *cf.* also *Re Grove-Grady* [1929] 1 Ch. 557.

[76] *Williams' Trustees* v. *I. R. C., supra.*

another way which does fall within the scope of this article, and that is that the only public benefit which derives from them is an indirect and incidental benefit. Obviously the real object of such trusts is to benefit the animals, and even if the public benefits incidentally from this object such benefit is not normally sufficient for the trust to be accepted as a charity. Thus, a trust for the benefit of the police, as we have seen (unless it is for a charitable purpose itself), is not charitable although it indirectly benefits the public.[77] Yet a trust for the benefit of animals is charitable although it also only benefits the public indirectly. Are animals, then, a more worthy object of charity than the police?

Summary

Trusts for charitable purposes will be regarded as for the public benefit and therefore as charitable if they are for the benefit of any of the following classes of persons.

(1) *The whole public;*
  (a) if the benefit is direct, *e.g.*, "for my country England,"[78] or for the establishment of an institution or trust which benefits the whole public, *e.g.*, a museum, school, or scholarships open to all persons, or
  (b) if the benefit is indirect, provided that any direct benefit is either,
    (i) only incidental to the main charitable objects, *e.g.*, a trust for the promotion of efficiency in the police which incidentally benefits the police,[79] or
    (ii) also of a kind which the law regards as charitable, and is for a section of the community, *e.g.*, a trust for the education of children of railwaymen which is of direct benefit to the children and indirect benefit to the public, or
  (iii) for animals.

(2) *The inhabitants of a definite geographical area. E.g.*, a trust for the poor of a certain town or village,[80] or for the repair or maintenance of a certain church.[81]

(3) *All persons following a certain trade or profession. E.g.*, a trust for railwaymen[82] or, by analogy, a trust for members of one of the armed services,[83] or for the police.[84]

[77] *I. R. C.* v. *Glasgow Police*, *supra*.
[78] *Re Smith* [1932] 1 Ch. 153.
[79] *I. R. C.* v. *Glasgow Police*, *supra*.
[80] *Att.-Gen.* v. *Clarke* (1762) Amb. 422.
[81] *Re Palatine Estate Charity* (1888) 39 Ch.D. 54.
[82] *Hall* v. *Derby Sanitary Authority* (1885) 16 Q.B.D. 163.
[83] *Verge* v. *Somerville* [1924] A.C. 496.
[84] *I. R. C.* v. *Glasgow Police*, *supra*.

(4) *All members of a particular association or club whose membership is sufficiently open.* *E.g.*, the Boy Scouts[85]; *quaere*, if in trusts of the fourth class, the membership must be unrestricted.[86]

(5) *All persons distressed by some common calamity.* *E.g.*, a trust for persons distressed by floods,[87] or air raids.[88]

(6) *All persons suffering from some common disability.* *E.g.*, a trust for the poor,[89] or the aged,[90] or the blind.[91]

(7) *All children and (perhaps) women.* *E.g.*, the National Society for the Prevention of Cruelty to Children.[92]

(8) (*Perhaps*) *the working classes.* *E.g.*, a trust to provide recreation for the working classes.[93]

(9) *All adherents of a certain faith.* *E.g.*, a trust for the benefit of Methodists.

In cases (3) to (9) the trust will still be charitable even if the classes there enumerated are further restricted by reference to some geographical area (and perhaps also in other ways) provided that the restrictions do not confine the number of potential beneficiaries to a class which is numerically negligible.

(10) *All members of a certain school, college or university.* *E.g.*, a trust to provide scholarships for university education open only to members of a certain school, or a trust to provide prizes in a school, college or university.

In cases (2) to (10) the class is probably *not* sufficient if the trust is one of general public utility, *e.g.*, for the building of a bridge.[94] In addition, where the trust is for the relief of poverty it will be charitable if it is for the benefit of:

(11) *The relations of a named person, or a number of named persons.* *E.g.*, a trust for the testator's poor relations,[95] unless the class is further restricted, *e.g.*, by being confined to the statutory next-of-kin.

(12) *The employees of a particular person or company.* *E.g.*, a trust for the relief of poverty among employees and former employees and their families of a certain company.[96]

(13) *All members of a particular association or club of restricted membership.* *E.g.*, a trust for the benefit of members of a club who may fall on evil days.[97]

[85] *Re Webber* [1954] 1 W.L.R. 1500.
[86] *I. R. C.* v. *Baddeley* [1955] A.C. 572.
[87] *Re North Devon Relief Fund* [1953] 1 W.L.R. 1260.
[88] *Re Hoburn Aero Components* [1946] Ch. 194.
[89] *Att.-Gen.* v. *Clarke* (1762) Amb. 422.
[90] *Re Robinson* [1951] Ch. 198.
[91] *Re Lewis* [1955] Ch. 104.
[92] *Per* Lord Simonds in *I. R. C.* v. *Baddeley* [1955] A.C. at 590.
[93] *Re Hadden* [1932] 1 Ch. 133; *cf. Guinness Trust* v. *Green* [1955] 1 W.L.R. 872.
[94] *I. R. C.* v. *Baddeley* [1955] A.C. 572.
[95] *Isaac* v. *De Froez* (1754) 2 Amb. 595.
[96] *Gibson* v. *South American Stores* [1950] Ch. 177.
[97] *Re Young* [1955] 1 W.L.R. 1269.

On the other hand, subject to the above, a trust is not charitable if it only benefits:

(14) *The relations of a named person, or a number of named persons. E.g.*, a trust for the education of the children of X, Y and Z.[98]

(15) *The employees of a particular person or company. E.g.*, a trust for the education of the children of the employees of Company X.[99]

(16) *The members of an association or club whose membership is restricted. E.g.*, (perhaps), a trust for Welshmen in London,[1] or for Methodists in the town of B.[2]

Postscript—The Recreational Charities Bill

One of the consequences of the decision in *I. R. C.* v. *Baddeley* has been to make doubtful the charitable nature of a trust for the provision, in the interests of social welfare, of facilities for recreation or other leisure-time activities. The Recreational Charities Bill (now before Parliament) is intended to remove this doubt and to declare that such trusts are charitable.

The Bill, as amended before the date of going to press, does not affect the subject-matter of this article; for clause 1 (1) of the Bill expressly recognises and preserves "the principle that a trust or institution to be charitable must be for the public benefit."

P. S. Atiyah.*

[98] *Re Compton* [1945] Ch. 123.
[99] *Oppenheim* v. *Tobacco Securities* [1951] A.C. 297.
[1] *Per* Lord Simonds in *Williams' Trustees* v. *I. R. C.* [1947] A.C. at 458.
[2] *Per* Lord Simonds in *I. R. C.* v. *Baddeley* [1955] A.C. at 590–593.

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THE *RATIO DECIDENDI* OF A CASE

In his most recent article [1] Professor Montrose raises a number of points which I shall attempt to answer as briefly as possible, following the order in which he himself raises them.

He suggests that I have confused two senses in which the term *ratio decidendi* is used; these two usages both exist, and are, therefore, both "correct." Furthermore, they are separable.[2] Thus, one could, according to Professor Montrose, accept one usage and discard the other, and so say, "I think the *ratio decidendi* (meaning the rule of law explicitly stated by the judge as the basis for his decision) of such and such a case is X, but I do not think it is binding" or, more baldly, "I do not think that the *ratio decidendi* of a case is binding." This, indeed, is what Professor Montrose himself is prepared to do.[3] Such a proposition as the last seems somehow odd in the mouth of a lawyer, and although a person making it could not, once he had defined his terms, be accused of obscurity, he might well be accused of a very eccentric use of language. The reason for this is not difficult to pinpoint—it is that the two usages discussed by Professor Montrose are not separable in the way he assumes. Surely those judges and writers (Professor Montrose excepted) who have meant by the term *ratio decidendi* "the rule of law propounded by the judge as the basis of his decision" have adopted this usage because they have thought that such a rule *is* the rule for which the case is of binding authority. Those who have adopted the other usage ("the rule for which the case is of binding authority") have been, to this extent, in agreement with those who adopt the former usage—they have only disagreed in so far as they think that the rule is to be isolated in some other way. The two usages are only separable in a way which is best explained by saying that the first usage (rule of law stated by judge) includes and implies the second (rule of law for which case is authority), but that the second usage gives no clue as to how the rule is to be isolated. This point appears to me to be completely missed in Professor Montrose's writings on the subject.[4] In a short note I did not raise it, and fail to see why I am criticised for not doing so. Had

1 (1957) 20 M.L.R. 587, where he criticises my note in (1957) 20 M.L.R. at p. 413.

2 (1957) 20 M.L.R. at pp. 587–588. The two meanings are ". . . the rule of law propounded by the judge as the basis of his ultimate decision in the case" and ". . . the rule of law for which a case is of binding authority."

3 (1957) 20 M.L.R. at p. 588. "The terminology whereby *ratio decidendi* signifies the rule propounded by the judges should not be allowed to be used to beg the question whether such a rule is of binding authority."

4 See in particular 2 West Aust.L.R. at pp. 329 *et seq.*

I treated of the " ambiguity " of the term *ratio decidendi* I should have advanced the argument I have just sketched to show that Professor Montrose has added to whatever ambiguity previously existed. Since I never raised the point I do not see that I begged any questions by failing to reproduce Professor Montrose's theorisings upon the usage of the term, nor do I see that the ambiguity he himself thinks exists could possibly be said to operate in relation to the occasions when I use the term in my note.

Professor Montrose objects to my usage both of the word " definition " and of the word " correct " in my description of his article as one which " contrasts two views as to the correct definition of the *ratio decidendi* of a case." [5] By " definition " I meant no more than " rule or rules for determining "—in the context this was obvious. I note that Professor Montrose himself uses the same word with the same connotation.[6] He also twice expressly accepts Glanville Williams when the latter says " The *ratio decidendi* may be defined. . . ." [7] As for the word " correct " I find Professor Montrose using it in the paragraph in which he sets out the subject to be discussed in his first article—" The main question is whether . . . the ' classical view ' is still correct " [8]—and it was this sentence which suggested my own brief summary of the point at issue in that article.[9] If he finds the word objectionable when used by Simpson he ought to be ready to explain why it is not objectionable when used by Montrose in the same sort of context. In fact we both used the word in that sense in which it is often used by lawyers—a doctrine is " correct " if it is generally accepted by the courts.

Professor Montrose goes on to suggest an ambiguity in the phrase " facts of the case " as I used it, the ambiguity arising because the word " facts " may mean either " particular facts " or " classes of facts." He would like to separate the two, and writes:—

> " Rules of law specify in their antecedents *classes* of facts . . . cases are concerned with specific actualities." [10]

I fail to see what relevance this distinction, even if it is well founded,[11] can have to what I wrote. The totality of the facts established in evidence in a case may be unique; so too will be

[5] (1957) 20 M.L.R. p. 588.
[6] (1957) 20 M.L.R. p. 589, n. 11, " Corbin, in commenting on the definition of a contract. . . . "
[7] (1957) 20 M.L.R. p. 125, n. 7, p. 587, n. 5.
[8] (1957) 20 M.L.R. p. 125. The omitted words are " to use Paton's language " —they refer to the expression " classical view."
[9] (1957) 20 M.L.R. 124.
[10] (1957) 20 M.L.R. 589 *et seq.*
[11] The problem of drawing the line between words signifying " particular " facts and " class " facts is not faced by Montrose. For example, consider his illustration of a " particular " fact pair of words—" Bill Sykes "—a class which might, for all one knows, include many such persons. Take the words separately and the point is stronger.

many of those facts considered individually. It is precisely by treating these "particular" facts—or at least some of them—as immaterial that rules of law capable of use in other cases are constructed. The particular facts thus discarded are immaterial in the simple sense that, if they had been otherwise, then (so long as the "class fact" generalisation would still have been permissible) the decision would have been the same. It is in this sense that lawyers frequently think of facts as being material,[12] and it is in this sense that only those facts of a case are material which correspond precisely to the facts specified in the rule of law which the judge, who decides the case, treats as the rule applicable to that case. This I shall call "the first sense." Nothing turns upon whether these facts are what Professor Montrose would call "particular" facts. Now it is quite true that all the facts established in evidence are "material" in quite a different sense in that they make the "class fact" description permissible. This I shall call "the second sense." Thus, if a rule of law propounded by a judge embodies the word "chattels," without qualification, then the fact that he was dealing with a shot-gun was treated by him as immaterial in the first sense—he indicates that his decision would be the same if he were dealing with a motor-car. In the second sense [13] the fact that he was dealing with a shot-gun was material, since, had the subject-matter of the suit been realty, the generalisation chattel would be inappropriate. If the expression "material facts" is used in this second sense no difficulty of an analytical sort arises over their determination, for all facts established in evidence will be "material." Because of this I should have thought

[12] Amongst them Professor Montrose—see his usage of the words in (1957) 20 M.L.R. at p. 594.

[13] It is in another sense still that all the facts established in evidence are "material" because later judges may select one or more of them as a basis for distinguishing the earlier case. To do this is, as Professor Montrose points out in his discussion of *Tulk* v. *Moxhay* ((1957) 20 M.L.R. p. 594), to explain an earlier case by facts which nobody in the earlier case regarded as conditioning the decision. In his discussion of *Donoghue* v. *Stevenson* ((1957) 20 M.L.R. p. 591) Montrose seems to miss the very point he himself makes in relation to *Tulk* v. *Moxhay*, for he does not distinguish the various meanings of "material." Thus, he uses the admitted fact that under the current practice, a later court is entitled to treat the opaqueness of the bottle in *Donoghue* v. *Stevenson* as "material" (*i.e.*, as a condition precedent to the decision) as an argument for saying that the court in *Donoghue* v. *Stevenson* itself treated it as "material" (*i.e.*, as a condition precedent to the decision). This does not at all follow. He backs up this argument by saying that a judgment must be read *secundum subjectam materiam*. The value of quoting this tag lies, surely, in the fact that it draws attention to three points.

(a) All the facts of the case ought to be looked at to clear up ambiguities in judicial expression.

(b) All the facts of the case may be looked at in the search for arguments for distinguishing that case.

(c) All the facts may be examined if the boundaries of a class specified in a rule of law in that case are uncertain. Thus, in the example used in the text the shot-gun fact tells us that "shot-guns are chattels." This proposition may be a rule of sorts, but I do not discuss the status of such rules here.

that the use of the word in my note was confined to the first sense. I agree that there are considerable difficulties in giving an account of the reasons which induce judges to treat some facts as immaterial (in the first sense) but I never purported to deal with these in a short note—nor did Professor Montrose in his short article. We both assumed that the context would make our meaning clear. At no point did I suggest that I thought that there was any *logical* reason why some facts and not others should be selected as material, and so I fail to see why Professor Montrose finds it necessary to set out Stone's arguments upon this point in a reply to my note.[14] This part of Professor Montrose's reply is introduced by his statement that the fallacy in the proposition I advanced " . . . is clear once it is realised that ' application ' of a rule to facts is the converse process to that of generalisation from particular fact to ' class ' fact." [15] This difficult sentence seems to mean that the fallacy is clear once it is realised that a judge's finding that a rule applies to a particular case does not depend upon (" is the converse process to . . . ") his finding that the material facts of the case correspond precisely to those specified in the rule of law. This amounts to saying that the fallacy in saying that X is the same thing as Y is clear once it is realised that X is not Y. Perhaps I have misunderstood Professor Montrose. I also find it difficult to comprehend this alleged fallacy for another reason. I wrote about a judge who " . . . treats a rule of law as applicable to the case before him. . . . " A judge does this when he orders that consequence to follow which the rule specifies—this one can surely call applying the rule. The converse process to this I take to be " not ordering the consequence specified in the rule." I do not follow how the converse process can be described as " generalisation from particular fact to ' class fact,' " unless Professor Montrose is using the word " apply " in some eccentric way.[16]

Professor Montrose assumes [17] that I was making an independent point when I wrote [18] " . . . it is submitted that the Goodhart theory is indistinguishable from the classical theory." This was

[14] Stone, *Province and Function of Law*, pp. 187 *et seq.*

[15] (1957) 20 M.L.R. 590.

[16] (1957) 20 M.L.R. 593.

[17] On this see Professor Montrose's article, " Judicial Law Making and Law Applying," (1956) *Butterworths South African Law Review*, p. 187. (The references given by Montrose to this article are misleading.) In it he develops a conception of " law applying." Briefly the argument is that the judicial process is more complex than the formula F (facts) × R (rule) = D (decision) would lead us to suppose; the judge, besides formulating the appropriate rule of law and ascertaining the particular facts of a case has to *apply* the rule—this may involve him in difficulties of interpretation, clarification of the terminology in the rule, etc. In *applying* the rule in this sense the judge may have to formulate subsidiary rules (see note 13, above). Even, however, if this special usage of the word " apply " is adopted the obscurity of Professor Montrose's argument remains.

[18] (1957) 20 M.L.R. 414.

not my intention, but I see that the sentence is not happily framed. As he says, however, nothing turns upon this.

Professor Montrose takes me to task for saying that Stone criticised the classical theory.[19] He says that Stone was objecting to "the English theory of precedent." Stone's actual words were [20]:

> "The English theory of precedent, as formulated by text writers, imports that a particular decision is explained by one *ratio decidendi*, or general proposition of which the particular decision is an application, and which is 'required' or necessary to explain that particular decision. Moreover, this general proposition is to be drawn from that particular case itself."

A footnote then adds,

> "It is as to the mode of drawing it [*i.e.*, the general proposition or *ratio decidendi*] that there is controversy. . . ."

Stone does not enter into this controversy except in notes where he criticises Goodhart's method of drawing it. Since he treats Goodhart as one of the controversialists, it seems fair to treat those modes of determining the *ratio decidendi* which Goodhart controverted as aspects of the controversy to which Stone refers. One such mode is that of the classical theory—you draw out the *ratio decidendi* by accepting the rule which the judge thought was necessary for his decision. All suggested methods of determining the *ratio decidendi* by examining a single case—including the classical theory—are equally subject to Stone's criticism, which is directed against two basic assumptions of what he describes generally as the English theory of precedent. He treats the parties to the controversy as to how the *ratio decidendi* is to be determined and their views on this point as only worth mention in a footnote, since, by criticising the two basic assumptions, he criticises all controversialists alike. The two assumptions are:—

(i) the assumption that the question "What single principle does a particular case establish?" can be sensibly answered at all.

(ii) the assumption that any single rule is logically "necessary" to explain a particular decision.

Both assumptions are inherent in the "classical" theory just as they are inherent in the views advanced by Gray, Salmond and Goodhart. On the classical theory one is clearly committed to the first assumption. Equally, one is committed to the second—one is accepting as sensible the judge's belief that some particular rule was "necessary" to decide the case, and upon Stone's view the judge's belief that some particular rule was "necessary" is as logically untenable as anybody else's belief to the same effect. As he points out, logic alone would permit the formulation of any number of possible rules.[21]

[19] (1957) 20 M.L.R. 593.

[20] Stone, *op. cit.*, p. 187.

[21] On p. 593 ((1957) 20 M.L.R.) I see that according to Professor Montrose, Stone (*op. cit.*, p. 187) pointed out that the Goodhart theory is one which says "that

Finally, Professor Montrose returns to his accusation that I misrepresented the nature of his article by saying that it contrasted the classical theory with the Goodhart theory [22]; this time the basis of his criticism is different. It would have been absurd, he suggests, to have done what I said he did, since this would be to contrast a genus not with another genus but with a species of another genus. This accusation of misrepresentation seems to me to be unfounded. In the first paragraph of his article Professor Montrose sets out the problem he proposes to discuss. This is, in his own words, "whether, to use Paton's language, the 'classical view' is still correct." [23] In contradistinction to the "classical view" he mentions the view of most jurists that the "classical view" is incorrect. The only jurists he mentions are Professor Goodhart and Dr. Glanville Williams. The latter is only mentioned as accurately reproducing Professor Goodhart's view of the matter. I thought, when I wrote the note, there, and I still think, that it was fair to describe the article as one which contrasted the classical view with the Goodhart view. The nature of Professor Montrose's arguments to the contrary is illustrated by the fact that they lead him into a misrepresentation of the Goodhart theory—to maintain the genus-species argument he has to say that Professor Goodhart asserted that the rule for which a case is authority is "constructed by later judges," a proposition never in fact maintained by that writer.[24]

In conclusion, Professor Montrose says that ". . . there is a great difference between the classical theory and the theory which permits cases to be explained by principles other than those propounded by the judge." With this statement I would entirely agree, nor am I prepared to admit that I ever, in my note, suggested the contrary. All that I said was that Professor Goodhart's argument as to the determination of the *ratio decidendi* contains an internal contradiction in that, having said that the rule stated by the judge may be ignored, he then goes on to propound a theory of his own whose basic assumption is that the judge's opinion as to what facts are material must be accepted. This basic assumption, in my view, leads to the conclusion, which Professor Goodhart failed to draw, that the rule stated by the judge ought to be accepted as the *ratio decidendi*. It was with this internal contradiction alone that my note was concerned.

A. W. B. Simpson.*

the rule of law for which a case is of binding authority *is not one which is pronounced, explicitly* or implicitly, *by the judge in the precedent case*, but which is constructed by later judges" (my italics). I find this hard to reconcile with his statement a few lines further up that Stone "nowhere refers" to the classical theory.

22 (1957) 20 M.L.R. at p. 593.

23 (1957) 20 M.L.R. at p. 125.

24 See Goodhart, *Essays in Jurisprudence and the Common Law*, at p. 25, where the author's rules for discovering the binding principle are stated.

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LEGISLATION

Cheques Act, 1957 [1]

The Cheques Act, 1957, which, *inter alia*, in section 1 protects a banker paying unendorsed or irregularly endorsed cheques, gives effect to the Recommendations of the Committee on Cheque Endorsement (Cmnd. 3), discussed in this *Review*, Vol. 20, p. 161, and is not, therefore, reviewed in detail. The provision in section 2 which in effect makes it unnecessary to endorse cheques cashed by the payee or paid into his account, has, of course, been much in the public eye, whereas section 4, the main effect of which is to extend the protection of the collecting banker under what, hitherto, has been section 82 of the Bills of Exchange Act, 1882, from crossed to open cheques, is probably of greater interest to bankers than to the general public. Extraordinary confusion has been created in the public mind by section 3, according to which an unendorsed cheque which appears to have been paid by the drawee bankers is evidence of the receipt by the payee of the sum payable by the cheque. Some people seem to have thought that, because the law gives to the debtor this additional facility of proving the payment, there has been a fundamental legal change relieving the creditor of any obligation to issue a receipt. The wording of the Act gives no excuse for this misapprehension.

O. K.-F.

The Advertisements (Hire-Purchase) Act, 1957

One of the objects of the Hire-Purchase Act, 1938, was to make clear to prospective hirers [1] the extent of the obligations incurred by signing the hire-purchase agreement. With this end in view the Act provides *inter alia* that, where it applies, the hire-purchase agreement must be signed by the hirer in person, and that it must contain certain minimum financial information.[2]

Putting such details into a legal document for signature is one thing. Ensuring that they are read is another. And it may well be that some people have been misled by advertisements such as "Yours for £1" into signing unread agreements committing them to substantial liability. Clearly no statistics showing the effect of misleading advertisements are likely to be available, but the problem

[1] 5 & 6 Eliz. 2, c. 36.

[1] Or to buyers under credit-sale agreements.

[2] See the Hire-Purchase Act, 1938, s. 2 (2) (hire-purchase agreements) and s. 3 (2) (credit-sale agreements).

caused the Board of Trade sufficient concern to discuss possible action with quite a number of interested trade associations, and to support the Private Member's Bill which is now the Advertisements (Hire-Purchase) Act, 1957.

The Act came into force on January 1, 1958. "Advertisement" is defined widely as including "every visual form of advertising," and includes catalogues and notices in shop windows as well as newspapers, cinema and television advertisements. It expressly excludes "any form of advertising consisting only of spoken words, with or without other sounds." [3] This plainly excludes advertising by sound-radio, and no doubt it is sufficient to exclude the personal caller who relies on his voice alone.[4]

An advertisement of goods with no more reference to hire purchase or credit sale than that "credit terms are available," or something similar, is not caught by the Act. The Act is aimed at incomplete, and therefore misleading, advertisements, and only applies to an advertisement of goods on hire-purchase or credit-sale terms which mentions the size of the deposit [5] or of any of the instalments, or which states that there is no deposit.[6]

If the advertisement is within the Act, then all the information specified in section 2 must be clearly displayed "in such a way as not to give undue prominence to any part of it in comparison with any other part." [7] The required information in respect of goods for which the amount of the deposit or of any instalment is given as a sum of money [8] is as follows:

(i) the deposit: either a statement that there is no deposit, or the amount of the deposit expressed as a sum of money or as a fraction or percentage of a stated sum; a "hidden deposit" (*i.e.*, the number of instalments payable before delivery of the goods) must also be revealed; and

(ii) the instalments: the total number, the amount of each (expressed as a sum of money) and the interval between each; and

(iii) "a sum stated as the cash price of the goods."

The only sanction for non-compliance with the Act is criminal: on summary conviction the maximum penalty is a fine of £50

[3] The definition is in s. 4 (1).

[4] The door-to-door salesman of goods which are sufficiently expensive to be sold on hire-purchase or credit-sale terms who does not produce a catalogue or picture must be rare.

[5] Whether by amount or by fraction or percentage.

[6] s. 1. An advertisement of goods for £5 or less *on credit-sale terms only* is outside the Act: otherwise there are no financial limits and the Act applies whatever the price of the goods advertised.

[7] s. 2 (1). On films and television the time devoted to each part must be taken into account.

[8] If the advertisement merely states the deposit as a fraction or percentage without giving the size of the instalments the only detail required is the nature of the price or sum of which the fraction is taken: s. 2 (3). It is difficult to be sure how much information is required when the advertisement states simply "No deposit": it is possible to argue that that is sufficient.

for a first offence, or £100 for subsequent offences.[9] This is an obvious weakness in the Act, for a far more potent penalty would be to deprive the advertiser of the right to enforce an agreement entered into as a result of an improper advertisement.[10] As it is, even if the hirer or buyer can prove that he entered into an unread agreement as a result of a misleading advertisement, it seems that this will be no defence if he is sued unless he can show misrepresentation [11] (and even then he will not be able to keep the goods).

It must be admitted that any attempt to link an advertisement to a subsequent agreement would not be easy. Speaking on the Report Stage of the Bill the Parliamentary Secretary to the Board of Trade gave some examples of the practical difficulties: "there would be difficulty in determining which particular advertisement was relevant to a particular agreement; how long an advertisement remained effective; by which of a trader's advertised terms he was actually tied, and so on. Application and enforcement would present very great problems." [12] But, with respect, this seems to be no reason why the civil sanction should not be an additional penalty: the onus would no doubt be on the hirer to prove the connection, but if he can satisfy the court there is no reason why this should not be a good defence.

This desire on the part of the promoters of the Bill to disclaim any intention of interfering with actual agreements is the explanation of section 4 (3), which at first sight seems a little odd: "For the purposes of this Act it is immaterial whether any information included in an advertisement does or does not correspond with the terms on which goods to which the advertisement relates are in fact disposed of." This is intended to make it clear that no offence is committed by a trader who enters into a hire-purchase agreement on terms different to those advertised, for example, by taking a larger deposit at the hirer's request. Unfortunately, this leaves the way clear for unscrupulous traders [13] to continue to issue misleading advertisements, provided they comply with section 2.

[9] The offence is committed by any person who displays or issues, or causes to be displayed or issued, an advertisement contravening the Act: s. 3 (1); but there is protection for newspaper proprietors, cinema managers, the Independent Television Authority, and other persons who did not devise or compose the advertisement: s. 3 (2).

[10] *Cf.* the Hire-Purchase Act, 1938, ss. 2 (2) and 3 (2).

[11] The Act is not concerned with agreements but with advertisements, and it is probable that such an agreement would not be held to be illegal. "Unless you get a clear implication . . . a court ought to be very slow to hold that a statute intends to interfere with the rights and remedies given by the ordinary law of contract"—*per* Devlin J. in *St. John Shipping Corpn.* v. *Joseph Rank, Ltd.* [1957] 1 Q.B. 267, at p. 288, discussed (1957) 20 M.L.R. 172 by Mr. C. Grunfeld. Even if the contract were illegal it seems that the owner could recover the goods: *Bowmakers, Ltd.* v. *Barnet Instruments, Ltd.* [1945] K.B. 65, C.A.

[12] Mr. F. J. Erroll, M.P., 582 H.C.Deb. 623 (June 28, 1957).

[13] Presumably there are some, for otherwise the Act would not be necessary.

Thus, the attractive advertisement "No deposit. 144 monthly payments of 8s. Cash price £25" complies with the Act. But there is nothing to stop the trader telling the eager customer that those terms are no longer available. After all, the chief object of the misleading advertisement is to get the customer into the shop: a forceful salesman can do the rest.

There are, therefore, serious limitations on the scope and effect of this Act. Nevertheless, it marks a further step in the statutory protection of the public against exploitation.

Aubrey L. Diamond.

NOTES OF CASES

Sovereign Immunity

The decision of the House of Lords in *Rahimtoola* v. *The Nizam of Hyderabad*[1] renders it necessary to resume the series of Notes which in the course of the last few years have appeared in these pages under the above heading.[2] There exists now, however, a ray of hope that a subject which must have become tedious to many readers will at not too distant a date lose its pressing character, for it would seem to be clear that reform in this field, so often advocated by so many, cannot be any longer delayed. This is so for two reasons. In the first place the opinions delivered by Lords Simonds, Reid, Cohen and Somervell involve so pregnant an extension of the doctrine of sovereign immunity that no legislator can be expected to stand by and allow the law, in the words of Lord Denning,[3] to become even "more enmeshed in its own net." Secondly, Lord Denning, though he reached the same result as the majority, not only dissented on many points of detail, but also outlined an acceptable solution of the problems with such persuasiveness that his voice cannot be ignored. It may be a matter for regret that the intervention of the legislator is required in a branch of the law which, on many grounds, is peculiarly in need of that degree of flexibility which used to be proclaimed (and practised) as one of the virtues of judicial legislation, but which a statute probably cannot preserve. In the present state of affairs, however, this is a reflection expressing sentimentality rather than realism.

In 1948, when Hyderabad was threatened by the invasion of Indian troops, the Finance Minister of Hyderabad, acting with ostensible, but without actual, authority, transferred a large sum of money, standing to the credit of his sovereign, the Nizam, with a London bank, to an account with the same bank, which had been opened for the purpose by the then High Commissioner for Pakistan, the appellant, and which was entitled "To Habib Ibrahim Rahimtoola (High Commissioner for Pakistan in London)." When the Nizam brought proceedings against the appellant and the bank to recover the money, the court was moved by the appellant to set aside the proceedings on the ground that they impleaded the State of Pakistan. This application succeeded before Upjohn J.,[4]

[1] [1957] 3 All E.R. 441; also reported in [1957] 3 W.L.R. 884.
[2] See (1957) 20 M.L.R. 273 with further references.
[3] p. 464.
[4] [1957] Ch. 185, 201.

it failed in the Court of Appeal,[5] but the House of Lords restored the order of Upjohn J.

The principle which the majority of the House of Lords established may be stated as follows: English courts have no jurisdiction in respect of an action against either the agent of a foreign sovereign State or an English bank for the recovery of money received by the agent in trust for the plaintiff and paid by the agent into his account with the defendant bank, if the agent accepted the money in his capacity as agent of the foreign sovereign State and the latter, as disclosed or undisclosed principal, has the legal title to, though no beneficial interest in, the bank account standing in its agent's name, it being irrelevant that the payment to the agent was made under a mistake of fact or in consequence of a wrongful act.

In the last resort this rule was derived by the majority from Lord Atkin's proposition[6] that a foreign sovereign, even if he is not a party to the proceedings, is impleaded where the action concerns "property which is his or of which he is in possession or control." It is too late to ask whether this proposition, which has come to be regarded as having almost statutory force, required application and extension, for the first time, to the case of a debt where, so it was thought, "there can be no question of possession or control"[7]; the Court of Appeal as well as Lord Denning have shown how the House, if it had wished so to do, could have prevented the further growth of the doctrine of sovereign immunity. It is also futile to point to the fact that the order made by the House creates, as Lord Reid admitted,[8] a deadlock in that the bank cannot safely pay the money to anyone, unless Pakistan sues it and thus invokes the very jurisdiction which was denied to the Nizam; this is a consequence brought about by the earlier decision of the House of Lords in *United States of America and Republic of France* v. *Dollfus Mieg et Cie. S.A.*[9] the remarkable implications of which were vividly illustrated by Lord Denning.[10] Rather it is necessary to emphasise the great significance of the fact that the decision of the majority would seem to be based on the appellant's agency, pure and simple, as opposed to his official status when he received the money, or the official character of the transaction resulting in the transfer, for, while all the Law Lords recited the official capacity in which the appellant accepted the transfer, the actual *ratio decidendi* is expressed in such language as to preclude the suggestion that the House intended its reasons of principle to be limited to the case where the defendant agent is a government

[5] [1957] Ch. 185, 224.
[6] *The Cristina* [1938] A.C. 485, at p. 490.
[7] *Haile Selassie* v. *Cable & Wireless, Ltd.* [1938] Ch. 839, at p. 847, *per* Sir Wilfrid Greene M.R.
[8] At p. 452.
[9] [1952] A.C. 582.
[10] p. 462.

official acting as such. Accordingly, it must be feared that the decision will come to be applied to much less unusual circumstances; to the case, for instance, in which A, the agent of a Liverpool merchant, without his principal's authority, pays money to B, the selling agent of a foreign sovereign State, in respect of a contemplated purchase of goods: if the purchase falls through, A's principal is unlikely to be able to recover the money from B or B's bank. The gravity of this situation is such that traders can no longer be left unprotected.

A second point involved in the view of the majority concerns the banking world. The English banks have always been determined to maintain that they have no contractual relationship with anyone other than their immediate customer, that that relationship cannot normally be affected by the doctrine of agency and that, accordingly, no third party such as the immediate customer's principal has any contractual rights against them. In the past they have been remarkably successful in defending this position,[11] although, of course, there is no reason of principle why the general rules of agency should not apply to bank accounts and although the equitable doctrine of tracing money has for many years been effective against bankers. The House of Lords has now lifted the veil of the immediate customer's identity a little further in cases in which, in opening the account, the immediate customer intended to act as an agent:

> "That the Government of Pakistan were the principals (disclosed or undisclosed, it matters not) for whom the appellant as agent held the account in question with the bank, is . . . established beyond doubt. They were, and are, in a position to sue the bank either in the name of their agent, the appellant, or, if he were unwilling that his name should be used, in their own name, adding him as a defendant. The bank could not pay any other person without disregard of, and detriment to, their interests. For the bank knows only the appellant and knows him, as I think, though it does not matter, as the agent of the Government." [12]

Pakistan, therefore, a person other than the customer, "has the legal title" [13]; "the account is the account of the Government of Pakistan in the name of its agent." [14] It does not by any means follow, however, that, where the bank account is opened by the immediate customer as principal and where it is only in paying specific sums to the bank for the credit of the account that he

[11] *Aschkenasy* v. *Midland Bank* (1934) 51 T.L.R. 34; *Banque des Marchands de Moscou* v. *Tovarishetvo Manufactur Rabeneck* [1949] W.N. 388 (H.L., unfortunately not elsewhere reported); *Kahler* v. *Midland Bank* [1950] A.C. 24 and, in particular, in the Court of Appeal [1948] 1 All E.R. 811; and see *Pinto* v. *Santos* (1814) 5 Taunt. 447; *Sims* v. *Bond* (1833) 5 B. & Ad. 389; *Société Coloniale Anversoise* v. *London & Brazilian Bank* [1911] 2 K.B. 1024.

[12] p. 446, *per* Lord Simonds.

[13] p. 446.

[14] p. 448.

intends to act as agent of their owner, the latter can be said to have a legal title to the part of the debt corresponding to the money paid by his agent.[15]

Both consequences to which attention has been drawn and the latter of which may by no means be unwelcome would have been avoided if Lord Denning's forceful and, if it is permissible to say so, robust approach to the problem had prevailed. In his view the legal title to the debt due from the bank vested, not in Pakistan, but in the appellant[16]; the Nizam, however, had shown both a legal and an equitable title in himself and could displace Pakistan's claim to immunity for reasons similar to those which caused the House of Lords in the *Dollfus Mieg* case[17] to allow the action to proceed in respect of the thirteen bars wrongfully sold by the Bank of England, and the Court of Chancery to assume jurisdiction over a trust fund in which a foreign sovereign claimed an interest.[18] Yet Lord Denning arrived at the same result as the majority, because he applied a test which for many years has in substance been adopted in most foreign countries and recommended for incorporation into English law[19]:

> "At the present time immunity should not depend on whether a foreign Government is impleaded, directly or indirectly, but rather on the nature of the dispute. Not on whether 'conflicting rights' have to be decided, but on the nature of the conflict. Is it properly cognizable by our courts or not? If the dispute brings into question, for instance, the legislative or international transactions of a foreign Government, or the policy of its executive, the court should grant immunity if asked to do so . . . but if the dispute concerns, for instance, the commercial transactions of a foreign Government (whether carried on by its own departments or agencies or by setting up separate legal entities) and it arises properly within the territorial jurisdiction of our courts, there is no ground for granting immunity."

It may be that the precise formulation of the principle requires further elaboration, but its kernel merits respectful, yet wholehearted, approval. In the present case it led to a conclusion which could be stated shortly and realistically, without reference to "the finer points of our domestic law,"[20] so irrelevant to a broad problem of international law: The action concerned "an inter-governmental transaction"[21] and, therefore, had to be stayed. Here is a welcome whiff of fresh air.

[15] *Cf. Sangster* v. *Commissioners of Inland Revenue* [1957] 2 All E.R. 208.
[16] pp. 457, 458.
[17] [1952] A.C. 582.
[18] See, among others, *Larivière* v. *Morgan* (1875) L.R. 7 H.L. 423.
[19] pp. 463, 464.
[20] p. 460, *per* Lord Denning.
[21] This phrase was first used by Upjohn J. [1957] Ch. 185, 209, but he failed to draw any legally relevant conclusion from it.

These observations cannot be concluded without special mention of a noteworthy pronouncement by Lord Denning which gives judicial authority to one of the main tenets of international law as a whole: "It is more in keeping with the dignity of a foreign sovereign to submit himself to the rule of law than to claim to be above it." [22]

F. A. Mann.

Loosening the Bonds of Lord Advocate *v.* Jaffrey [1]

The writer had occasion recently to conclude an article on the *Travers* v. *Holley* [2] series of cases by saying that "it should . . . be within the bounds of possibility for an English court to recognise a decree granted to a wife by the courts of her 'separate domicile' in the American sense of that term." [3] It would seem that the recent and, in the light of what has gone before, quite logical decision of Karminski J. in *Robinson-Scott* v. *Robinson-Scott* [4] goes some way towards fulfilling these hopes.

The husband, of British nationality and domiciled at all material times in England, sought a declaration that his marriage had been validly dissolved by the District Court of Zurich in the following circumstances. He and his wife, a Swiss national domiciled in the Canton of Zurich, where she had lived since 1943, were married in Zurich in December, 1950. The ceremony complied with Swiss law. There was a short honeymoon in Switzerland after which the husband returned to his work in London, where he lived. The wife had promised to join him there after settling her personal affairs, but never fulfilled her promise. In July, 1951, she commenced proceedings [5] in the Zurich court, which granted her, in July, 1953, a decree of dissolution under Article 142 of the Swiss Civil Code on the grounds that the matrimonial relations between the parties were deeply and irreparably disrupted—a ground not known, it will be noted, to English law. In the course of its judgment, the Zurich court took express notice of the English rule that the wife's domicile remains the same as that of her husband

[22] p. 461.

[1] [1921] A.C. 146: this is the well-known case which settled that if a husband deserts his wife and acquires a new domicile of choice, she will retain that new domicile and cannot acquire a different domicile separate from his until the marriage ends.

[2] [1953] P. 246: the subsequent cases are *Carr* v. *Carr* [1955] 2 All E.R. 61; *Dunne* v. *Saban* [1955] P. 178 and *Arnold* v. *Arnold* [1957] 2 W.L.R. 366.

[3] "Recognition in England of Non-domiciliary Divorce Decrees," 6 I.C.L.Q. 608, at p. 624. See, too, the conclusion offered at p. 612.

[4] [1957] 3 W.L.R. 842, also reported [1957] 3 All E.R. 473.

[5] The husband had notice of them, for he disputed the jurisdiction of the Zurich court and denied some of the charges raised against him; further, the court pronounced its findings with full reasons: see [1957] 3 W.L.R. at p. 844.

throughout coverture notwithstanding her separation from him, but nevertheless applied the provisions of the Swiss Civil Code allowing her to acquire a separate domicile and assumed jurisdiction upon that basis. Karminski J., having heard the husband and the Queen's Proctor (the wife not having defended the petition), made the declaration as prayed.

He began his judgment with an historical survey of the problem before him,[6] pointing out that,[7] in *Travers* v. *Holley*,[8] the "relevant provisions of the two Matrimonial Causes Acts differed only in wording: in other respects their provisions were identical." Here, he observed, there could be "no question of the Zurich courts exercising a jurisdiction *mutatis mutandis* on the same basis as the English courts, since the jurisdiction of the Zurich court was based on a concept of domicile wholly unrecognised by English law."[9] Turning to a consideration of *Dunne* v. *Saban*,[10] he noted that the wife had there brought proceedings in the Florida courts having resided in Florida "for not more than two years before the proceedings were commenced"[11]—a fact which, it must be observed, did not influence Davies J.—and distinguished it, saying that in the case before him "the wife had been resident in Zurich for over three years, whereas in *Dunne* v. *Saban*,[12] the wife had been resident in Florida for only two years."[13] He agreed with Davies J. that an English court should recognise the right of foreign courts to encroach upon the principle of domicile only to the extent to which an English court also does, adding that the present difficulty was to "measure the extent where two systems of law approach the whole question of jurisdiction in wholly different manners."[14] Karminski J. thought as to *Carr* v. *Carr*[15] that, inasmuch as Barnard J. stated that English courts would respect a foreign decree based on provisions similar to English provisions by reason of the fact that English courts would grant a decree in those circumstances, he "must have been limiting himself to the position before him, namely, *a substantial similarity in statutory provisions as to jurisdiction*."[16] As to *Arnold* v. *Arnold*,[17] the learned judge thought that the Finnish provisions might in some respects resemble section 18 (1) (*a*) of the Matrimonial Causes Act, 1950,[18] and that,

[6] [1957] 3 W.L.R. at pp. 845–847.
[7] *Ibid.*, at p. 847.
[8] *Supra.*
[9] *Ibid.*, at p. 847.
[10] *Supra.*
[11] [1957] 3 W.L.R. at p. 847.
[12] *Supra.*
[13] [1957] 3 W.L.R. at p. 848.
[14] *Ibid.*
[15] *Supra.*
[16] [1957] 3 W.L.R. at p. 849. Italics supplied.
[17] *Supra.*
[18] Matrimonial Causes Act, 1950, s. 18 (1): "Without prejudice to any jurisdiction exercisable by the court apart from this section, the court shall by virtue of this section have jurisdiction to entertain proceedings by a wife in any of the following

applying the *Travers* v. *Holley* doctrine, the decree might have been recognised on the ground of statutory similarity.[19] Observing that Mr. Commissioner Latey seemed to have gone further than this, apparently basing his decision in part upon section 18 (1) (*b*) of the 1950 Act,[20, 21] the learned judge thought that whatever might have been the legislature's motive in requiring three years' residence under that section, he could not agree with the Commissioner that the period of residence demanded by the law of a foreign court to found jurisdiction was immaterial. He thought rather that if "similarity is the basis of recognition, there must be similarity in fact though not in terminology" [22] and that there was a "profound difference between the two years' residence in Florida found in *Dunne* v. *Saban* [23] and the residence of five and upwards in Zurich in the present case." [24] Karminski J. thought the real question was whether an English court could recognise a foreign decree where the facts showed that the wife was resident in the territory of the decreeing court for three years immediately preceding the commencement of the suit there, despite the fact that the foreign court's jurisdiction was based on different grounds. Such a question, he said, was one *primae impressionis* in an English court.[25] Quoting from an article of Dean Griswold,[26] and observing that the Court of Appeal in *Travers* v. *Holley* [27] had lifted "the heavy hand of the *Le Mesurier* [28] case or at least mitigated its weight," [29] the learned judge thought that the answer to the question he had posited was: "where, in fact, there has been three years' residence by a wife in the territory of the foreign court assuming jurisdiction in a suit for dissolution, the English court should accept that as a ground for exercising jurisdiction, because it would itself accept jurisdiction on proof of similar residence in England. It is not essential for recognition by this court that the foreign court should assume jurisdiction on the grounds laid down by section 18. . . .

cases, notwithstanding that the husband is not domiciled in England, that is to say:—(*a*) in the case of any proceedings under this Act other than proceedings for presumption of death and dissolution of marriage, if the wife has been deserted by her husband, or the husband has been deported from the United Kingdom . . . and the husband was immediately before the desertion or deportation domiciled in England."

19 [1957] 3 W.L.R. at p. 849.

20 "In the case of proceedings for divorce or nullity of marriage, if the wife is resident in England and has been ordinarily resident there for a period of three years immediately preceding the commencement of the proceedings, and the husband is not domiciled in any other part of the United Kingdom or in the Channel Islands or the Isle of Man."

21 See [1957] 2 W.L.R. at p. 278.

22 [1957] 3 W.L.R. at p. 849.

23 *Supra.*

24 [1957] 3 W.L.R. at p. 849.

25 *Ibid.*, at p. 850.

26 65 H.L.R. 193, at p. 231. Quite a wealth of academic writing was put before the court: see [1957] 3 W.L.R. at p. 845.

27 *Supra.*

28 [1895] A.C. 517. These are the words of Dean Griswold.

29 [1957] 3 W.L.R. at p. 850.

It is sufficient that facts exist which would enable the English court to assume jurisdiction. I find that the Zurich court had jurisdiction and that the decree pronounced by that court in favour of the wife on July 3, 1953, was valid."[30]

Many interesting points arise out of this decision:—

(a) The decree was pronounced in the Zurich courts within three years of the parties' marriage. By the Matrimonial Causes Act, 1950, s. 2 (1), no petition may be presented in England during the first three years of the marriage without the leave of the court, which will be given only where the case is one of exceptional hardship suffered by the petitioner or of exceptional depravity on the part of the respondent. This point seems not to have been adverted to in the case under review. It would therefore seem that this English rule may be left out of account in applying the "*Travers* v. *Holley* doctrine."

(b) The requirement that the wife shall have been, for three years immediately preceding the commencement of proceedings, ordinarily resident within the jurisdiction of the court which grants the decree appears to be satisfied, and the "*Travers* v. *Holley* doctrine" still to operate, even if some of that period of ordinary residence is pre-nuptial. This point, too, does not seem to have been adverted to, although it must be confessed that there is nothing in the wording of section 18 (1) (*b*) to cause one to suspect that the three years' ordinary residence in England must be wholly post-nuptial. Indeed, it would seem that some of that period has to be pre-nuptial when a wife seeks a *nullity* decree in pursuance of section 18 (1) (*b*) on one of the grounds mentioned in section 18 (1) (*b*), (*c*) and (*d*) of the Act.

(c) It seems that the learned judge felt no concern that the Swiss grounds for divorce were not known to English law. Indeed, he did not advert to the subject at all and it would seem, therefore, that he is in agreement on this topic with Mr. Commissioner Latey in *Arnold* v. *Arnold*.[31]

(d) In *Dunne* v. *Saban*,[32] the husband's domicile immediately before the desertion of his wife was in Florida: it appears from the statement of the facts that he formed the *animus deserendi* before, and not after, he reverted to his English domicile of origin.[33] *Mutatis mutandis*, therefore, the wife, whose pre-desertion domicile, *even in the English sense*, was in Florida, could have obtained a decree in England under section 18 (1) (*a*) of the 1950 Act. Karminski J. having now said that it is not essential for recognition by an English court that the foreign court should assume jurisdiction on the grounds laid down in section 18, it surely seems

[30] *Ibid.*
[31] [1957] 2 W.L.R. at p. 377; (1957) 6 I.C.L.Q. at p. 612.
[32] *Supra.*
[33] See [1957] 3 W.L.R. at p. 981.

to follow that *Dunne* v. *Saban* [34] ought no longer to be regarded as good law.

(e) It appears from a detailed study of the facts of each of the reported English cases in which the "*Travers* v. *Holley* doctrine" was successfully applied, *viz.*, *Travers* v. *Holley* [35] itself, *Carr* v. *Carr* [36] and *Arnold* v. *Arnold*,[37] that the wives had ordinarily resided in the respective countries in which their husbands, and therefore they, were domiciled immediately before they were deserted—for a period of at least *three* years before they commenced their suits. Thus, they could have asked an English court to assume jurisdiction under *either* section 18 (1) (*a*) *or* (*b*). The wife, however, in *Dunne* v. *Saban*,[38] could have sought a decree only under section 18 (1) (*a*), as has been shown above. The present case is thus the first in the series to indicate that compliance with *both halves of section 18* is not required. The wife in the present case could not have called section 18 (1) (*a*) in aid by analogy for the simple reason that she was not domiciled *in the English sense* in Switzerland immediately before her husband left Switzerland for England. By English law, she was already domiciled in England.

(f) In the light of the above discussion one is left to wonder whether the "*Travers* v. *Holley* doctrine" is perhaps applicable only where the wife has in fact "ordinarily resided" in the English sense of that term for three years immediately prior to the commencement of her suit within the jurisdiction of the decreeing court. That this may possibly be the case is apparent from the words of Hodson L.J. in *Levett* v. *Levett and Smith* [39] where he says:

> "Even assuming that the wife was resident within the jurisdiction of the German court for a sufficient time to bring the doctrine into force, assuming that she had been deserted by her husband in Germany so that the situation was exactly the same *mutatis mutandis* as that contemplated by section 18 of the Act of 1950, to my mind section 18 of the Act of 1950 affords no support for the proposition that a husband, because he is respondent to proceedings brought by a wife, ought himself to be enabled to obtain relief on his answer."

Further, in *Dunne* v. *Saban*,[40] Davies J. is reported as saying:

> "*Travers* v. *Holley* [41] deals with a case where the foreign court's jurisdiction depended on three years' residence, as does ours in similar circumstances." [42]

[34] *Supra.*
[35] *Supra*: decided by reference to s. 18 (1) (*a*).
[36] *Supra*: decided by reference to s. 18 (1) (*a*).
[37] *Supra*: decided by reference to s. 18 (1) (*b*).
[38] *Supra.*
[39] [1957] 2 W.L.R. 484, at p. 488. According to the facts reported, the wife went to live in Germany in 1952 and instituted her suit towards the end of July in that year and the husband was given a decree absolute about a year later.
[40] *Supra.*
[41] *Supra.*
[42] [1954] 3 W.L.R. at p. 989.

If the above be true, then *Dunne* v. *Saban*[43] is correctly decided after all. But, let us suppose that H, domiciled in England but resident in France, marries in Paris W, domiciled and resident in France. Her domicile will, of course, become English upon marriage. H then deserts her after three years of married life and acquires a domicile in Germany where he commits adultery. According to section 18 (1) (*a*) of the 1950 Act, W can at once proceed in the English courts to get a decree in England without residing there for longer than is necessary to appear in court on the day of the hearing! One wonders, at this stage, whether the draftsman of section 18 (1) (*a*) should not have concluded with the words ". . . and the husband was immediately before the desertion or deportation domiciled *and resident* in England." It is at any rate certainly hard to see how a man could be deported from our shores if he were not resident here. However, on the face of it, section 18 (1) (*a*) allows W to obtain a decree in England in these circumstances. That being so, it must follow that *Dunne* v. *Saban*[44] is wrong, and that the "*Travers* v. *Holley* doctrine" must apply whenever, *mutatis mutandis*, one *or* other *or* both of section 18 (1) (*a*) and section 18 (1) (*b*) is satisfied.

P. R. H. Webb.

Discharge of Obligations in the Conflict of Laws

Private international law has a reputation for being complicated, but there can be few problems of greater difficulty even in this intricate subject than the one confronting Wynn-Parry J. in *Re United Railways of the Havana and Regla Warehouses, Ltd.*[1] Stated in the abstract, the question looks simple enough: we have two clear rules of the conflict of laws: (a) the extinction or discharge of contractual obligations is governed by the proper law of the contract; (b) governmental acts concerning property (including choses in action) are valid in so far, but only in so far, as the property concerned is "situate" within the jurisdiction of the particular government at the time of the act. Where is the borderline separating the fields of application of these two rules? In order to see how difficult this question is in practice, all one has to do is to look at the facts of this case. It arose in the course of the voluntary winding up of an English company which had owned and operated a railway in Cuba. In 1921 the company decided to raise additional capital in the United States. In accordance with a type of financial scheme known as the "Philadelphia Plan" the Commercial Trust Company of Philadelphia, as trustee

[43] *Supra.*
[44] *Supra.*
[1] [1957] 3 All E.R. 641.

(later succeeded by the First Pennsylvania Company for Banking and Trusts, the applicant in the case under review), issued to the public, through a New York banking firm which underwrote the issue, "United Railways of Havana Fifteen Year 7½ per cent. Equipment Trust Certificates" which were serviced by the trustee. The railway company formed a subsidiary, incorporated under the law of Delaware, to which it sold part of its rolling-stock, the purchase price being partly covered by the amount of the certificates paid with the agreement of the trustee by the New York bank to the subsidiary. The subsidiary in turn, by a lease executed in New York, let the rolling-stock to its parent, the rent being payable at the offices of the trustee in Philadelphia and, as to the "interest" part of the rent, in New York in gold coin of the United States of the 1921 standard of weight and fineness. This "rent" was equal to the half-yearly payments to be made by the company for interest, capital and premium on the loan raised by the trustee through the certificates. On the same day, the subsidiary assigned to the trustee its interest under the lease. Subsequently, it assigned to the company the right to reacquire the property after the expiry of the lease, and, having performed its ephemeral function, ceased to exist. The effect of all this was that the railway company had obtained the loan capital under the guise of a purchase price, and that it paid interest, sinking fund, etc., under the guise of rent, the trustee for the certificate holders being the "lessor." The lease of the rolling-stock was in fact nothing but a security for a loan, but, all the same, from the legal point of view, it was clearly a lease and nothing else. As Wynn-Parry J. said [2]: "The certificates themselves impose no liability on the company. The company's liability, assuming that it still exists, arises solely under the lease."

After having, through redemption or purchase of certificates, in fact discharged a large proportion of the loan, the company defaulted on its payments in 1931, but until 1934 it continued to pay that part of the rental which represented interest (as distinguished from capital). In 1934, 1940 and 1941 moratoria were established by Cuban law which, provided Cuban law governed the matter, would have applied to the company at that time. In 1949 its management and control were taken over by an "interventor" on behalf of the Cuban Government, and finally, under powers granted by a series of "Law-Decrees" of 1953, the Cuban State acquired by purchase the entire assets of the company and declared that the company was to receive the price "free from all responsibility with respect to liabilities outstanding in Cuba, represented by debts, obligations and responsibilities arising out of the properties which are to be acquired by the State" which, according to a "confidential agreement," included the "responsibilities that may be derived from the

[2] *Ibid.*, p. 647 F.

. . . Certificates," provided such responsibility was held to exist by any court. Subsequently the State sold to another company the undertaking thus acquired.

The claim for which the trustee company sought to prove in the winding up of the railway company and which the liquidator had rejected was mainly for the unpaid instalments payable under the lease, with interest and "premium," and, in the alternative, for breach of a covenant in the lease not to assign the rolling-stock without the consent of the lessor, or, in the further alternative (a point of special interest from the conflicts angle), for damages for conversion of the rolling-stock.

Wynn-Parry J. held that the proof had been wrongly rejected. The question whether the contractual rights of the applicants under the lease had been extinguished was governed by the proper law of the contract and not by that of the *situs* of the debt. The proper law of the contract, however, was not the law of Cuba but that of Pennsylvania. In the concluding parts of his judgment the learned judge dealt with the conversion of the dollar amounts into sterling, with Cuban law in case it was held by a higher court to apply (this part of the judgment is so poorly reported that it is impossible to know what the learned judge said, although it appears to have included some very important points on *renvoi* and other matters), and with the claims for damages.

Much the most important point is the first. The liquidator contended that under Cuban law the company's liability to the trustees had been extinguished, but, as the learned judge held, and, with respect, rightly held, this question was governed by the proper law. The principal significance of the case is in the refusal of Wynn-Parry J. to make a distinction between the law governing a contractual obligation to pay, do or deliver something *in futuro* and the law governing a debt which is due, a distinction indicated in the judgments of Pearson J. in *Jabbour* v. *Custodian of Israeli Absentee Property* [3] and of Upjohn J. in *Re Helbert Wagg & Co., Ltd.*[4] These two learned judges had tried to make the forms of action rise from their graves; it is good that in the present case the judge has laid this ghost. It is indeed, from the conflicts point of view, irrelevant whether the claim would, before 1852, have been in assumpsit or in debt: a debt arising from contract is still a contractual claim, the discharge of which is governed by the proper law in accordance with the rule laid down in the classical nineteenth-century cases such as *Ellis* v. *M'Henry* [5] and *Gibbs* v. *Société des Métaux.*[6] Where, however, and this is the true line of distinction, "the title to the debt," *i.e.*, not its existence or extinction, but the identity of the

[3] [1954] 1 W.L.R. 139; [1954] 1 All E.R. 145.
[4] [1956] Ch. 323.
[5] (1871) L.R. 6 C.P. 228.
[6] (1890) 25 Q.B.D. 399.

creditor, is involved, *i.e.*, where the debt is to be considered not as a contractual obligation, but as a piece of property, all questions of the effect of legislative, administrative or judicial intervention must be judged in accordance with the *lex situs*. For these propositions, it is submitted, the present case provides clear authority.

This authority was badly needed in view of the confusion which had been created by some of the "Russian bank" cases which are analysed in Wynn-Parry J.'s judgment. These cases, it should be remembered, were, unlike the present case, concerned with the winding up not of an English company but of foreign corporations whose existence had been terminated under the *lex incorporationis*. Very special considerations apply in such cases. They yield no general principle.

Nor does the present case touch the question of the line which separates cases of "particular transfer" of debts by acts of State from cases of "universal succession" brought about by act of State, as in *National Bank of Greece and Athens* v. *Metliss*.[7]

That the law of Pennsylvania was the proper law of the contract was, it is suggested, fairly clear. The case confirms anew (if this was needed) the vital difference between the law governing property rights and the law governing contracts concerning property rights. That the parties to the lease expressed their intention "to enter and execute this lease in accordance with the provisions of the law of the Republic of Cuba to the end that this lease may be deposited or filed and/or registered thereunder" and that in the assignment from the subsidiary to the trustee there was also a reference to enforcement of the agreement under the law of Cuba was certainly not tantamount to a choice of Cuban law as the proper law of the contract.

O. K.-F.

The Hire-Purchase Dealer's Liability

In *Andrews* v. *Hopkinson*[1] McNair J. has helped to clarify certain aspects of the legal relationship between dealer and customer in hire-purchase transactions. The most common way for expensive goods, especially motor-cars, to be disposed of on hire purchase is for the dealer to sell them outright to a finance company which thereupon, as owner, hires the goods to the customer under a hire-purchase agreement. As far as the customer is concerned, he considers that he is doing business with the dealer—he commonly says that he is "buying the goods on hire purchase" from the dealer—but the contract of hire purchase is, in fact and in law, with the finance company.

[7] [1957] 3 W.L.R. 1056; [1957] 3 All E.R. 608. H.L.
[1] [1957] 1 Q.B. 229; [1956] 3 W.L.R. 732; [1956] 3 All E.R. 432.

What if the goods are unsatisfactory? If they are not fit for use, or not of merchantable quality, the hirer's natural impulse is to complain to the dealer. But it is quite clear that there is no contract of sale of goods between the dealer and the hirer, so that the hirer cannot sue the dealer relying on the conditions and warranties implied under the Sale of Goods Act, 1893: *Drury* v. *Victor Buckland, Ltd.*[2]

Can the hirer sue the finance company? In principle, he can, for the terms implied into a hire-purchase agreement, whatever those terms may be, will operate unless effectively excluded. If the agreement is within the Hire-Purchase Acts there is generally no difficulty, for most of the implied terms cannot be excluded, while the remaining condition is unlikely to have been excluded owing to the difficulty of doing so. But if the agreement is outside the Acts, as in the case of all new, and many secondhand, cars, the only limits to the exclusion of implied terms are to be found in those cases dealing with fundamental breach of contract, such as *Karsales (Harrow), Ltd.* v. *Wallis.*[3] The chances are, therefore, that the implied terms will be excluded, as they are in virtually all finance company hire-purchase agreements.

But the hirer may yet have rights against the dealer, even though there is no sale of goods. In *Brown* v. *Sheen and Richmond Car Sales, Ltd.*[4] the dealer told the customer that the car was in perfect condition. Jones J. held, without detailed analysis of the situation, that this "warranty" induced the customer to enter into the contract of hire purchase with the finance company, and gave the customer damages for breach of the warranty. McNair J. later referred to the principle behind this decision, and applied it to rather different facts, in *Shanklin Pier, Ltd.* v. *Detel Products, Ltd.*[5]

In *Andrews* v. *Hopkinson*[6] McNair J. has now applied the same principle to another hire-purchase case. The dealer showed the customer a 1934 car which had been in his possession for about a week and told him: "It's a good little bus. I would stake my life on it." As a result the customer took the car on a hire-purchase agreement from a finance company. About a week later he was involved in a collision as a result of a failure of the steering mechanism and was seriously injured. McNair J. held that the dealer's words amounted to an affirmation that the car was in good condition and reasonably fit for use on a public highway, and that the car was not in such a condition. He held that this affirmation was an enforceable warranty and accordingly gave judgment for the customer.

[2] [1941] 1 All E.R. 269, C.A.
[3] [1956] 1 W.L.R. 936, C.A.
[4] [1950] 1 All E.R. 1102.
[5] [1951] 2 K.B. 854.
[6] [1957] 1 Q.B. 229.

This means that there is an enforceable contract between the dealer and the customer: "warranty" is used here in the sense of a binding promise (see Denning L.J. in *Oscar Chess, Ltd.* v. *Williams* [7]). Counsel for the dealer suggested that the words were no more than sales talk or "puffing," but McNair J. held that had there been a sale of the car by the dealer to the customer the words would clearly have been intended to have contractual force; this seems to be the same as saying that there was an intention to create legal relations.

The obvious difficulty in such a contract is to find the consideration. McNair J. said that the promise was "supported by the consideration that [the dealer] should cause the hire-purchase finance company to enter into a hire-purchase agreement with the intended purchaser," [8] but this, with respect, appears to move from the promisor rather than the promisee. The promisee (*i.e.*, the customer) must, to adapt Pollock's phrase, show that he has paid a price for the promise, and the true consideration appears to be his act in entering into the hire-purchase agreement with the finance company: "in consideration of your (the customer) taking the car on hire purchase from the finance company, I (the dealer) promise that it is in good condition."

This was enough to dispose of the case, but in addition McNair J., having found that the dealer ought to have appreciated the possibility of dangerous wear in the steering, held that he had been negligent, extending the principle in *Herschtal* v. *Stewart & Ardern, Ltd.*[9] Perhaps the chief interest of the case, however, lies in the judge's comments, deliberately not part of his decision, on a further argument of the customer. He said: "I feel there is much to be said for the view that, in a transaction such as the present, which though not in law a transaction of sale between the parties is closely akin to such a transaction, the court ought to imply . . . a condition or warranty [similar to that in section 14 (1) of the Sale of Goods Act, 1893] if any contractual relationship between the parties can in fact be established." [10]

If this view is acted upon by the courts it is difficult to resist the conclusion that, irrespective of the dealer's sales talk, there is invariably a contract to be implied between dealer and customer in a form such as this: "in consideration of your signing the hire-purchase agreement, I (the dealer) agree to sell the car to the finance company." In this contract the implied term that the car is reasonably fit for the purpose can take effect. If this is established by the courts, doubtless the next move by the dealer will

[7] [1957] 1 W.L.R. 370, 374, C.A.
[8] [1957] 1 Q.B. 229, 235.
[9] [1940] 1 K.B. 155.
[10] p. 237. McNair J. pointed out that in *Drury* v. *Victor Buckland, Ltd.*, above, the possibility of a contract between dealer and customer other than one of sale was not apparently advanced or considered by the Court of Appeal.

be an express contract in writing with the customer, with the addition (in legible but regrettably small print?) of words excluding express or implied terms. Then the next round in the contest between the customer and The Rest can begin. Perhaps the removal of the financial limits in the Hire-Purchase Acts would be simpler.

Aubrey L. Diamond.

Measure of Damages for Breach of a Contract of Hire

In my note on *Thompson* v. *Robinson*[1] which was published at (1956) 34 Can.Bar Rev. 969 I regretted Upjohn J.'s omission in that case to consider *British Automatic Co.* v. *Haynes*,[2] which appeared to be inconsistent with *Re Vic Mill*,[3] on which he relied. I went on to say[4]: "The *British Automatic Co.* case is, however, considerably weakened by the fact that *Re Vic Mill* was not cited to the court nor was it considered in the judgment. Further, even if the *British Automatic Co.* case had been considered in the *Thompson* case, there can be little doubt that the decision in *Re Vic Mill* would, both on principle and in view of the heirarchy of authority, have been followed." *Interoffice Telephones, Ltd.* v. *Robert Freeman Co., Ltd.*,[5] a decision of the Court of Appeal,[6] now provides support for this comment by overruling the *British Automatic Co.* case.

In the *Interoffice Telephones* case the defendants agreed to hire telephone equipment from the plaintiffs, who agreed to instal, let and maintain it in efficient working order. The period of hire fixed by the contract was twelve years, but after some six years had expired the defendants were forced to leave the offices in which the equipment was installed, and, although at one time they thought of removing the equipment with the consent of the plaintiffs, they found that their new premises were already equipped with a similar installation so that they had no use for anything further in that way. In these circumstances they repudiated the contract and the plaintiffs brought an action for damages. The sole issue concerned the measure of damages, and the principal argument before Pilcher J. concerned the validity of a clause in the contract prescribing the damages payable in the event of default by the defendants. Pilcher J. held this clause to be void as constituting a penalty in that it was applicable in a number of different circumstances of varying importance, and so damages fell to be awarded in accordance with the proper principle of the law of contract. The evidence showed

[1] [1955] 2 W.L.R. 185; [1955] 1 All E.R. 154.
[2] [1921] 1 K.B. 377 (Salter J.).
[3] [1913] 1 Ch. 465 (C.A.).
[4] (1956) 31 Can.Bar Rev. 969, at p. 977.
[5] [1957] 3 W.L.R. 971; [1957] 3 All E.R. 479.
[6] Jenkins, Parker and Pearce L.JJ.

that the demand for this equipment was a limited one and that the plaintiffs always had a supply sufficient to meet any demand. In these circumstances, Pilcher J., following the *British Automatic* case, awarded damages to the plaintiffs (1) for loss of rental until the expiration of such a period as the plaintiffs would require, making reasonable dispatch, in order to let the equipment out to somebody else (six months); (2) the cost of removing the equipment; and (3) the cost of reconditioning it.

The plaintiffs appealed on the ground that "the evidence being that there was always a supply to meet any demand, it cannot be right to bring into account against the plaintiffs a notional re-hiring of the installation taken back from the defendants, for the substituted transaction with a new customer would not in truth diminish the loss sustained by the plaintiffs at all, inasmuch as that substituted customer would simply be taking on hire the machine taken back from the defendants instead of another machine which, as the evidence shows, the plaintiffs could have provided."[7] The Court of Appeal found this proposition to be supported by *Re Vic Mill* and approved Barry J.'s decision in the unreported case of *Telephone Rentals, Ltd.* v. *R.C.A. Photophone, Ltd.* that the principle of *Re Vic Mill* was just as much applicable to cases of hiring as to cases of sales of goods.

The Court of Appeal, accordingly, awarded as damages a sum representing (i) the loss of rent over the unexpired period of the contract (six years) less (a) future maintenance charges; (b) a discount for receiving in one sum an amount which, had the contract run its full length, would have been received only over a period; and (c) the depreciated value of the equipment recovered inasmuch as this could be relet; and (ii) the cost of reconditioning the equipment since it could not be relet until this was done.[8]

The *Interoffice Telephones* case is the fourth of a quartet of recent cases which deal with the measure of damages for breaches of contracts of sale or hire [9] and which appear to justify the following propositions:—

1. When a purchaser fails to take delivery of goods which he has agreed to buy, and when there is no shortage of the goods in question to meet all immediate demands in the

[7] [1957] 3 W.L.R. 971, at p. 975; [1957] 3 All E.R. 479, at p. 482.

[8] The headnote to the report in the *All England Reports* [1957] 3 All E.R. 479 is inaccurate. It contains no reference to the deduction for the depreciated value of the equipment but speaks of a "deduction for reconditioning the apparatus." As is clear from Jenkins L.J.'s judgment, (i) what was deducted was the estimated value of the equipment recovered and (ii) what was allowed was the cost of reconditioning: see [1957] 3 W.L.R. 971, at p. 974; [1957] 3 All E.R. 479, at p. 482. The headnote to the report in the *Weekly Law Reports* [1957] 3 W.L.R. 971 is both clear and accurate.

[9] The other three cases are: *Thompson* v. *Robinson*, *supra*; *Charter* v. *Sullivan* [1957] 2 W.L.R. 528; [1957] 1 All E.R. 809; (1957) 35 Can.Bar Rev. 442; and *Telephone Rentals* v. *R.C.A. Photophone*, *supra*.

locality of the vendor's business, the vendor is entitled to recover from the defaulting purchaser the profit which he would have made had the contract been performed. See *Thompson* v. *Robinson.*

2. On the other hand, when the goods in question are in short supply and insufficient to meet the demand, the vendor will not be entitled to recover his loss of profit from the defaulting purchaser, since *ex hypothesi* the vendor will have sold the same amount of goods and made the same profit as he would have done if the purchaser had carried out his contract. See *Charter* v. *Sullivan.*

3. The operation of section 50 (3) of the Sale of Goods Act, 1893, which prima facie prescribes the measure of damages for breaches of contracts for the sale of goods, depends upon there being an "available market." The interpretation of this phrase has not yet been conclusively settled, but the following judicial suggestions have been made:

(a) "What I understand by a market in such a case as this is, that when the defendant refused to take the 300 tons the first week or the first month, the plaintiffs might have sent it in wagons somewhere else, where they could sell it, just as they sell corn on the *Exchange* or cotton at *Liverpool*: that is to say, that there was a fair market where they could have found a purchaser either by themselves or through some agent at some particular place. That is my notion of the meaning of a market under those circumstances": *per* James L.J. in *Dunkirk Colliery Co.* v. *Lever.*[10] The objection to this is that section 50 (3) becomes generally inapplicable if its operation is confined to corn, cotton and commodities which are sold in similar ways. Moreover, it should be noted that Jenkins L.J. in *Charter* v. *Sullivan*[11] doubted if James L.J.'s observations should be applied as an exhaustive definition of an available market in all cases.

(b) "Had the matter been *res integra*, I think I should have found that an 'available market' merely means that the situation in the particular trade in the particular area was such that the particular goods could freely be sold, and that there was a demand sufficient to absorb readily all the goods that were thrust on it, so that if a purchaser defaulted, the goods in question could readily be disposed of": *per* Upjohn J. in *Thompson* v. *Robinson.*[12] The objection to this is that it appears to be too narrowly confined: in many cases today the terms on which a trader

[10] (1878) 9 Ch.D. 20, at p. 25, applied in *Thompson* v. *Robinson*, *supra*.
[11] [1957] 2 W.L.R. 528, at p. 533; [1957] 1 All E.R. 809, at p. 813.
[12] [1955] 2 W.L.R. at p. 191; [1955] 1 All E.R. at p. 159.

is appointed as a dealer restrict his activities to a specified locality: it is submitted that Upjohn J.'s definition gives him an undeserved advantage out of his own restrictive agreement, since it often happens that the goods could be sold in a neighbouring locality. It should be noted that Jenkins L.J., in *Charter* v. *Sullivan*,[13] did not find Upjohn J.'s definition entirely satisfactory.

(c) "I doubt if there can be an available market for particular goods in any sense relevant to section 50 (3) of the Sale of Goods Act, 1893, unless those goods are available for sale in the market at the market or current price in the sense of the price, whatever it may be, fixed by reference to supply and demand as the price at which a purchaser for the goods in question can be found, be it greater or less than or equal to the contract price. The language of section 50 (3) seems to me to postulate that in the cases to which it applies there will, or may be, a difference between the contract price and the market or current price": *per* Jenkins L.J. in *Charter* v. *Sullivan*.[14] If this is the correct view then it follows that whenever the sale of a commodity is controlled by trade protection and price maintenance agreements, the concept of the "available market" is destroyed.

4. If there is no "available market" the plaintiff will recover the damages which he has actually sustained: these will be calculated in accordance with propositions 1 and 2 above.
5. There is no difference between the principles applicable in breach of a contract to hire goods and those applicable in breach of a contract for the sale of goods. See the *Interoffice Telephones* case.

O. R. Marshall.

An Insufficient Note or Memorandum

Everybody seems to remember section 40 of the Law of Property Act, 1925, and to know that no action may be brought upon any contract for the sale of land unless the agreement upon which such action is brought or some memorandum or note thereof is in writing and signed by the party to be charged. The defendants in *Timmins* v. *Moreland Street Property Co., Ltd.*[1] orally agreed to purchase three houses from the plaintiffs for the sum of £39,000 and one of the company's directors on their behalf signed a cheque for 10 per cent. of this amount as a deposit. The receipt the company received for this money read: "Received of Moreland

[13] *Ante*, note 11.
[14] *Ibid.*
[1] [1957] 3 W.L.R. 678 (C.A.), also reported [1957] 3 All E.R. 265.

Street Property Co. the sum of £3,900 as a deposit for the purchase of 6, 8 and 41, Boundary Street, Shoreditch (freehold), which I agree to sell at £39,000. Dated this 20th day of July, 1955. W. H. Timmins, Trustee of James Keeves Trust, 25, Bloomsbury Square, W.C.1."

Now, it will be recalled that if one can spell out of one document a reference to another document, one is at liberty to give evidence as to what that other document is, and if that other document contains in writing all the terms of the contract, there is a sufficient memorandum within the statute by reading the two documents together.

The court unanimously held that the receipt constituted a sufficient memorandum of the agreement, so that the plaintiffs, who had signed it, could, of course, have been sued. But the question in the present case was whether the cheque, which was signed by the defendants, could be held to contain any reference to the receipt so that the cheque and the receipt could be put together to enable the defendants to be sued.

The defendants, first of all, argued on the facts of the case that when the cheque was signed, the receipt had not yet been drafted, so that there was no document at that time in existence to which the cheque could have referred. This argument was rejected on the grounds that the giving of the cheque and the giving of the receipt were all part of one and the same transaction and stop-watches have no place in a court of law.

Now the cheque, as is normal business custom, was drawn in favour, not of W. H. Timmins, the plaintiff, but of the plaintiff's solicitors. Therefore, maintained the defendants, one merely had a cheque drawn on July 20 by A in favour of X, for £3,900, and a receipt which happened to be dated July 20, given to A, by Z, which, by a coincidence, was also for £3,900. What is there from the face of the cheque to join it to any other document, or if there is, why join it to this particular document? The court confessed that they could find no adequate reason. "I do not see how it could be possible without oral evidence to connect the cheque made out in favour of [the solicitors] with the receipt given by the plaintiff": *per* Jenkins L.J. "If one places the cheque and the receipt side by side, it is not obvious on an inspection of them that they originally formed a single document and could be taken and read together": *per* Romer L.J. "The signature is on the cheque only and I do not find any satisfactory way of linking it up with the memorandum—that is, the receipt": *per* Sellers L.J.

But what, one is tempted to ask, would have happened if W. H. Timmins had been named upon the cheque? "The position," declared Romer L.J., "might have been different." The question, one feels, will be happily left to examinees to solve.

D. G. Valentine.

High Trees in New Zealand

"Equitable" alias "promissory" alias "new" estoppel has emigrated to the antipodes. In *P.* v. *P.*,[1] McGregor J. applied the principle derived from *Central London Property Trust, Ltd.* v. *High Trees House, Ltd.*[2] and *Combe* v. *Combe*.[3] Each new application of it clarifies the principle, but there are still areas of doubt. For example, must a defendant relying on such an estoppel show that he has incurred a detriment in reliance on the representation?

In *P.* v. *P.* there was a deed of separation under which the husband agreed to pay £6 10s. a month to his wife. Later he divorced her, and the decree absolute contained an order that he pay 1s. a year maintenance. The Public Trustee (the insane wife's administrator) wrongly assumed that this order abrogated the maintenance provision in the separation deed, and wrote as follows to the husband: "The order cancels the previous separation agreement but it will be necessary to collect the arrears of maintenance up to the date on which the order became effective. . . ." The husband believed this, paid the arrears by instalments, and took no further action. The Public Trustee, having discovered his error, now sued the husband for four-and-a-half more years' worth of monthly instalments of £6 10s. commencing with the date of the decree absolute. McGregor J. (on appeal) gave judgment for the defendant.

The learned judge considered the English authorities, judicial and juristic, and came to the conclusion that the defendant had first to show a representation by the plaintiff that the strict rights under the contract would not be enforced. The fact that this would be a representation of law or of intention or as to the future was no objection, as "common law" estoppel was not being considered. Having established such a representation, the party setting up the doctrine then had to show that he had acted on the belief induced by the other party. That was the case here, as the husband had done nothing when he would otherwise either have paid £6 10s. a month or have taken proceedings to get out of the obligation. Thirdly, "When the conditions of applicability are present, in my view, it is then for the court to decide whether it would be inequitable to allow the party seeking so to do to enforce the strict rights which he has induced the other party to believe will not be enforced."[4]

Iniquity (if that is the right noun corresponding to "inequitable") of enforcement and detriment to the defendant are clearly not coterminous. There can be detriment without iniquity. If there is a continuing detriment, the plaintiff can enforce the strict

[1] [1957] N.Z.L.R. 854.
[2] [1947] K.B. 130.
[3] [1951] 2 K.B. 215.
[4] [1957] N.Z.L.R. 859.

rights if he gives the defendant such notice of his intention to do so as will enable the latter to terminate the detriment. But can there be iniquity without detriment? *P.* v. *P.* does not decide. Despite the absence of any explicit requirement of detriment in the judgment, there was detriment to the defendant and it was regarded as material. McGregor J. said[4]: "In the belief induced by this letter, . . . the appellant . . . refrained from any proceedings under the Divorce and Matrimonial Causes Act, 1928, to set aside or vary the post-nuptial settlement effected by the provisions of the deed. It seems to me it would be inequitable now to allow the respondent to enforce the rights. . . ." The fact that the husband had paid nothing under the deed since getting the letter was also referred to, but there is no indication that this alone would have made it inequitable to exact payment.

There is no case of equitable estoppel succeeding where the only act of the defendant in reliance on the representation has been to organise his finances (*e.g.*, by spending all his money on other things) without providing for the obligation represented to have been abandoned. It is true that this was the only action of the defendant in the *High Trees* case, but the representor was not there trying to collect arrears. Certainly, Denning J. (as he then was) said in that case that arrears could not be recovered if sought, and this is supported by *Wallis* v. *Semark*.[5] The statement by McGregor J. that it is for the court to decide whether it would be inequitable to allow the plaintiff to go back on his representation is an attractively general way of stating the principle. It should suffice to defeat impediments based on a narrow view of detriment to the defendant. "Detriment" tends to be linked with notions of consideration. Doubtless promissory estoppel will most frequently succeed where there is detriment to the promisee in reliance on the representation. It is submitted, however, that enforcement of the original obligation may be inequitable without any detriment (in the narrow sense), and that the categories of what is inequitable can never be closed.

L. A. Sheridan.

Extra-Territorial Validity of U.S. Divorce

Out of respect for the law and the legal profession of the United States, some attempt must be made to correct the disturbing impression created by comments of Sachs J. in *Macalpine* v. *Macalpine*[1] on aspects of American conflicts law. He suggests (basing his opinion on so-called "expert" evidence) that states in the Union will recognise the validity of judgments in sister-states *even where*

[5] [1951] 2 T.L.R. 22 (and see (1952) 15 M.L.R. 336–340).
[1] [1957] 3 All E.R. 134 (also reported [1957] 3 W.L.R. 698).

they are obtained by the plaintiff's fraud—a most surprising state of affairs if true.

The facts of *Macalpine* present little in the way of novelty. The parties were married and lived together in England for twelve years. In 1942, the husband went to the United States and by 1948, when he petitioned for divorce, had acquired a domicile in an American state. His petition, on the ground of non-cohabitation for eight years, alleged that he did not know his wife's present address or whereabouts and as a result notice of the proceedings was published only in local Wyoming newspapers and not sent to the wife. The decree was granted in 1949 and Macalpine remarried in Colorado in 1951. His "first" wife, still in England, learned of the "divorce" in 1954 and petitioned for divorce herself in this country, alleging that the Wyoming decree should not be recognised since it was contrary to natural justice and that her husband had therefore been living in adultery since his "remarriage" in 1951. Sachs J. allowed the petition. Macalpine, since leaving England, had carried on a desultory correspondence with his wife and knew her address and whereabouts perfectly well. His statements to the Wyoming court were clearly fraudulent in the light of this, as they were made for the express purpose of preventing his wife from receiving notice of the proceedings. The decree obtained was therefore contrary to natural justice, would be treated as a nullity here and the wife's petition granted.

There can be no doubt that the authorities [2] justified the judge's decision. His comments [3] as to the possible treatment of a similar case in a United States court, however, give rise to doubt. On the evidence before him, he concluded that the Wyoming decree would be recognised as valid throughout the United States unless set aside first by a competent Wyoming court.

Yet to make this assertion is to overlook two elementary provisions of the Federal Constitution. First, it seems that Macalpine's fraud would be a breach of the "due process" requirement of the Fourteenth Amendment. This provision, requiring no state to "deprive any person of life, liberty or property without due process of law," has been widely interpreted and can now be extended to provide for a fair trial of any issue in accordance with the principles of natural justice. In relation to the service of notice in particular, a reasonable and bona fide attempt must be made to contact the defendant, failing which "the substitute that is most likely to reach [her] is the least that ought to be required if substantial justice is to be done." [4] For example, in *Leichty* v. *Kansas City Bridge Co.*,[5] the facts were very similar to those in the present case. The plaintiff filed a false affidavit

[2] Cited and quoted from at length on pp. 138–139.
[3] See p. 138, letter B; p. 141, letter B.
[4] *McDonald* v. *Mabee*, 243 U.S. 90, 92 (1917), *per* Holmes J.
[5] 345 Mo. 629; 190 S.W. 201 (1945, Missouri).

that he did not know the address of his wife and gave an erroneous "last known address" so that he could obtain service by publication within the state and mailing of notice that he knew would not reach her. For present purposes it is sufficient to say that the Supreme Court of Missouri, when asked to recognise the validity of the decree obtained, held it to be void because of the denial of "due process."

And so far as recognising the validity of the decree in sister-states is concerned, the Constitution again raises a barrier in the shape of Article IV, section 1—the "Full Faith and Credit" clause. This provides that "Full Faith and Credit shall be given in every State to the public Acts, Records and judicial Proceedings of every other State."[6] Generally speaking, therefore, a regularly obtained decree in one state will be recognised in another.[7] Similarly, in a proceeding *in rem* (or *quasi in rem*, as in divorce) constructive service of process effected properly will satisfy the requirements of due process and be accorded Full Faith and Credit elsewhere.[7] But a fraud on the court, as in *Macalpine*, will alter the position. By deceitfully inducing the court to assume jurisdiction over an absent non-resident the husband in effect made the proceeding into an *ex parte* application—his wife was never effectively served with process and never submitted to the court's jurisdiction. Although the Wyoming court may have been the correct domiciliary court in which to bring the action (and so have jurisdiction over the subject-matter), its *domestic* jurisdictional requirements were never satisfied and so could be treated as a *brutum fulmen* elsewhere.[8] The attack would not be made on the ground of simple fraud but rather on the basis that the fraud went to the jurisdiction of the court and prevented a valid decree from ever being pronounced.[9] In the *Leichty* case already mentioned, for instance, the Missouri court held that the fraud perpetrated on a Kansas court by the husband-petitioner prevented there being any adequate jurisdictional basis for a decree, which could therefore be refused Full Faith and Credit.[10]

[6] The machinery for putting this into operation is provided by s. 1738 of the U.S. Code.

[7] *Williams* v. *North Carolina* (*No. 1*), 317 U.S. 287 (1942); *Atherton* v. *Atherton*, 181 U.S. 155 (1901).

[8] This point seems to be overlooked by the learned note in (1958) 74 L.Q.R. 8 at 9. It is suggested that, in view of the text above, the question before Sachs J. *did* involve a dispute as to jurisdiction and that there is nothing in his judgment to refute the suggestion that it was treated on this basis. Indeed, the quotation with approval (at p. 9) of the decision of Vaughan Williams L.J. in *Pemberton* v. *Hughes* [1899] 1 Ch. 781 at 796, concerning "jurisdiction over the person," shows that Sachs J. was fully aware of the jurisdictional implications of the case.

[9] See American Jurisprudence, *Constitutional Law*, s. 952.

[10] Similarly, in the very famous case of *Williams* v. *North Carolina* (*No. 2*), 325 U.S. 226 (1945), the U.S. Supreme Court held that North Carolina could refuse to recognise the divorce of one of its domiciliaries by a Nevada court, on the

The way is thus open for other United States courts to treat the Wyoming decree on its merits. The husband's fraud takes the case outside the limits of Full Faith and Credit and leaves no rule which compels recognition by the courts of a sister-state. Even comity cannot "be invoked to give extra-territorial effect to a judgment obtained by fraud and without notice." [11]

Alan Milner.

U.S. *v.* Du Pont (General Motors)

The Supreme Court of the United States decided in June, 1957, that Du Pont's acquisition of a substantial minority of the ordinary shares of General Motors forty years before was a violation of section 7 of the Clayton Act.[1] The court, in a four to two decision, three judges not participating, reversed the trial judge and ignored the bulk of the Complaint and the Government's Brief on Appeal which, though charging a violation of the Clayton Act, framed the major issues in terms of violation of sections 1 and 2 of the Sherman Act, arguing that Du Pont's relation with G.M. involved a combination which both restrained trade (in violation of section 1) and tended to monopolise a part of trade (in violation of section 2). The result is an opinion which is interesting as something of a logical puzzle, in addition to its importance because of the parties involved: the largest motor-car and the largest chemical producer in the United States, respectively the second and fourth largest industrial concerns, with combined assets over $11 billions.

The trial centred about two issues: (1) did Du Pont's shareholdings and the participation of Du Pont employees and associates in G.M.'s management add up to control of G.M. by Du Pont; (2) if there was control, was it used in such a way as to pre-empt the General Motors purchases of certain products for Du Pont to the exclusion, complete or partial, of competing suppliers—the most

basis that the facts before the court in North Carolina showed that there had been no intention of acquiring a new domicile in Nevada and so that state had *no divorce jurisdiction* over the parties.

[11] *Matthews* v. *Matthews*, 139 Ga. 123, 125; 76 S.E. 855 (1912, Georgia).

[1] *U.S.* v. *E. I. Du Pont de Nemours and Co., et al.*, 77 S.Ct. 872; 353 U.S. 586 (June 3, 1957). The Complaint was filed in June, 1949; the trial court handed down its decision in December, 1954, reported in 126 Fed.Supp. 235. This note rests on the two opinions, the *Complaint* and the *Briefs in Appeal* of the two parties in the Supreme Court. The relevant portion of the Clayton Act (38 Stat. 736, 15 U.S.C. 25) provides "That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce."

important products being paints, especially automobile finishes, and certain types of fabrics.[2]

The most important facts can be summarised as follows. In 1917, Du Pont, seeking to find some use for its wartime liquid accumulations, made substantial purchases of G.M. shares; in 1920, the financial difficulties of Durant, then G.M.'s president, and other major shareholders led Du Pont to double its investment, bringing its holdings to 38 per cent. of the ordinary shares. Beginning in 1923, Du Pont reduced its holdings by selling shares to G.M. for distributions as bonuses; this process came to end in 1938 with Du Pont holding 23 per cent., which was its participation at the time of the suit. From 1920 on, Du Pont was by far the largest single shareholder. Du Pont officers and associates held major management posts in G.M., especially up to 1940. Pierre S. and Lammot Du Pont shared the chairmanship of G.M.'s Board from 1917 to 1937, and they and others served on the important Finance and Executive Committees of the Board. Du Pont was a major supplier of paint and fabrics to G.M., and G.M. was by far Du Pont's most important customer for automobile finishes and fabrics. In recent years, some 80 to 90 per cent. of Du Pont's sales of "Duco" automobile finish have been to G.M.; so have 90 per cent. of Du Pont's sales of automobile fabrics. G.M. has purchased from Du Pont about 70 per cent. of its requirements of all paints, and perhaps 50 per cent. of its requirements of fabrics of the relevant type.

The District Court found for defendants on both issues. It concluded that there was no showing of control, that Du Pont's stock purchase was made for investment only, with no intention of achieving or exercising control of G.M.'s commercial operations, and that the officers and employees of G.M. acted at all times for the best interests of G.M. in dealing with Du Pont. It found that G.M.'s substantial purchases from Du Pont were made on the basis of merit, a conclusion resting both on the examination of particular purchase decisions and on the variation in the extent to which the several divisions of G.M. which made independent buying decisions, used Du Pont paints and fabrics.[3] The absence of control itself disposed of the charge of Sherman Act violation; the absence of restraint reinforced this conclusion, and also disposed of the Clayton Act charge.

[2] In addition to pre-emption of these markets, the Government charged that Du Pont acquired a preferential position in the manufacture of tetraethyl lead for "Ethyl" antiknock compound and a monopoly in the manufacture of "Freon" refrigerant, both products developed and patented by G.M. For brevity, we omit further discussion of these charges, except to point out that, in our judgment, the evidence for the Government view was much weaker on these matters than on those we discuss below.

[3] The court also pointed out that certain other Du Pont products, for example, brake fluid and neoprene rubber, were sold to other motor-car manufacturers and were never purchased by G.M., despite continued Du Pont efforts to sell them.

On appeal, the Government relied chiefly on three points: (1) the size of Du Pont's shareholdings combined with occupancy of major managerial positions in G.M. by Du Pont men made control inevitable, if only by creating an atmosphere of "what's good for Du Pont is good for General Motors" around the director's table; (2) contemporaneous documents showed Du Pont's initial intent to make the G.M. market a closed preserve[4]; and (3) Du Pont's sales of paint and fabrics to G.M. were such an overwhelming proportion of Du Pont's sales to the automobile industry, although G.M. accounted for between 35 per cent. and 50 per cent. of total car output since 1935, and less previously, as to indicate that something more than merit was involved. Du Pont, of course, reiterated the arguments contained in the District Court's opinion.

The opinion of the court endorsed the first two of these contentions. Since the decision rested on section 7 of the Clayton Act, making it unnecessary to reach the Sherman Act issues, the third point was endorsed with a difference: the purchasing relations of the past sufficed to demonstrate the "probability that the acquisition would result in the condemned restraints" whether or not they supported the conclusion that there had already been "monopolisation" or "restraint of trade."

This line of reasoning raised two further questions. The first concerned the relevant market within which the prohibited effect threatened. On this the court found that "automobile finishes and fabrics have sufficient peculiar characteristics and uses to constitute them products sufficiently distinct from all other finishes and fabrics to make them a 'line of commerce' within the meaning of the Clayton Act"; further, the substantiality of this market and of the G.M. part of it was clear. The second concerned the period within which section 7, directed to the prevention of "incipient" restraints, was appropriately invoked. On this the court said: "'Incipiency' in this context denotes not the time the stock was acquired, but any time when the acquisition threatens to ripen into a prohibited effect. . . . (T)he Government may proceed at any time that an acquisition may be said with reasonable probability to contain a threat that it may lead to a restraint of commerce or tend to create a monopoly of a line of commerce."

The dissent raised a variety of objections to the court's reasoning, of which three concern us chiefly.[5] First, the dissenters agreed

[4] The most striking of the early documents, which was quoted in part by the court, was a memorandum from Raskob, then Du Pont treasurer, outlining for the Finance Committee the reasons for purchasing G.M. stock. The fifth of the five points of the summary was: "Our interest in (G.M.) will undoubtedly secure for us the entire Fabrikoid, Pyralin, paint and varnish business of those companies, which is a substantial factor." There were other similar expressions.

[5] Mr. Justice Burton wrote the dissent, which was three times as long as the opinion of the court; he was joined by Frankfurter. Messrs. Clark, Harlan and Whittaker did not participate. Mr. Justice Brennan spoke for the court, and was joined by Black, Douglas and the Chief Justice. The other points were the

with the trial court that the facts showed that Du Pont had exercised no restraints on G.M. purchasing. The absence of any actual restraint for thirty years hardly justified an inference of probable future restraint. Second, they denied that the Government had met the burden of showing that automobile finishes and fabrics did constitute separate markets; Du Pont's sales to G.M. measured against the total sales of these types of products to all users were insignificant: perhaps 8·5 per cent. for finishes, and 1·6 per cent. for coated fabrics, imitation leathers, and the like. Even complete control of this portion of the market would not constitute a prohibited restraint. Third, the dissenters urged strongly that the court's view of the scope in time of section 7 was not only wrong, but mischievous. "Thus, over forty years after the enactment of the Clayton Act it now becomes apparent for the first time that section 7 has been a sleeping giant all along. Every corporation which has acquired a stock interest in other corporations after . . . 1914, and which has had business dealings with that corporation is exposed retroactively to the bite of the newly discovered teeth of section 7."

The logic of the court's opinion on this last point is indeed obscure. Given the Sherman Act, which deals with existing restraints, it is hard to justify the application of the less stringent standards of the Clayton Act, which have their origin in the desire to prevent what it may be difficult to cure, to an action taken thirty years in the past. Either a restraint of Sherman Act proportions has resulted, or there is nothing which justifies action.

We may speculate that the weakness of the evidence of achieved restraint had some connection with the court's choice of the grounds for decision. Examination of the two Briefs on Appeal and the long opinion of the District Court suggests the following conclusions. There was an intent to pre-empt the G.M. market for Du Pont, at least in the beginning. The size of Du Pont's shareholdings and the role of Du Pont men in G.M. management did result in significant Du Pont influence on G.M. decisions. Whether this influence in fact resulted in a non-competitive preferred status for Du Pont paint and fabrics is not clear. The denials of defendants, based as they are on the recitals of motive, and interpretations by officers and employees of their own past conduct are also unconvincing. The results are more relevant, but they are ambiguous. The mutual importance of Du Pont as supplier and G.M. as customer in paints and fabrics is not merely an accident; yet the possibility that this situation resulted from decisions by Chrysler and Ford, one to seek another supplier and the other to supply itself, as

inapplicability of section 7 to vertical mergers; the inappropriateness of deciding what was argued and tried chiefly as a Sherman Act case on Clayton Act grounds; the applicability of Rule 52a of the Federal Rules, which enjoins appellate courts to respect findings of fact of trial courts unless "clearly erroneous." These are all important points, but must be passed over in a brief note.

the defence argued, cannot be dismissed. Neither, however, can the argument that these decisions were a response to the Du Pont-G.M. tie, in the context of increasing concentration in the automobile market. The Government failed to make a case for separate markets in automobile finishes and fabrics; the few points cited from the record by the court hardly meet the issue, and the Government's Brief on this point relied on sheer assertion. Again, however, we have not been shown that the relevant markets are not separate: the Government has not met its burden of proof, but the issue is unresolved as to whether it could have, had it tried.

These conclusions, if correct, make clear that the court could not have found a violation of section 2 of the Sherman Act. But is it equally clear that a violation of section 1 could not be made out? An alternative line of argument to justify the court's conclusion might be this. The character of the Du Pont-G.M. relationship warrants its description as a "combination," whether or not "conspiracy" or "agreement" were present. Given the fact of combination involving purchase-and-sale transactions between two firms occupying positions like those of G.M. and Du Pont, can we not say that a combination which has the potential of restraining trade by foreclosing a substantial market is illegal, whether or not the restraint is actually accomplished, and whether or not the whole of a properly defined market is affected, just as we say that combinations which aim at fixing prices or sharing markets are illegal, whether or not they actually succeed in so doing or cover the whole market? Such an extension of present doctrine of *per se* illegality under section 1 of the Sherman Act is less of a stretch than the retroactive application of the standard of prospective restraint involved in section 7 of the Clayton Act.

We may further speculate that the court was influenced by the size and general market positions of Du Pont and G.M., and, at the very least, it was concerned to set a standard for application of section 7 as amended in 1950 [6] even though the case was not strictly relevant to the new statute. The anxieties of the dissenters as to the consequences of the decision appear exaggerated. The court's view was not the view of a majority of the justices. Situations at all similar in terms of the size and position of the parties are rare if they exist at all. Good or bad, the decision is not likely to serve as a precedent for wide application of the old statute to intercorporate shareholdings of long standing.

Carl Kaysen.

[6] The Cellar amendment, 64 Stat. 1125, 15 U.S.C. s. 18, which extended and strengthened the previous prohibition.

Binding Effect of a Collective Agreement—Measure of Damages for Breach of Contract of Employment

It is surprising to find the decision of the Court of Appeal in *National Coal Board* v. *Galley* [1] among the "starred cases" in the *Weekly Law Reports*. Cases on collective agreements (which determine the wages and other conditions of employment of about 55–60 per cent. of all those working under contracts of employment in this country) are rare. So are cases on damages for breach of a contract of employment (with which *Galley's* case is also concerned). The decision of the Court of Appeal in *Ebbw Vale Steel, Iron & Coal Co.* v. *Tew*,[2] on which the plaintiffs in *Galley's* case relied, is of major importance for the law of employment, and for the legal principles governing the assessment of damages for breach of contract in general. Yet, it is not, as far as the present writer knows, reported anywhere except in the *Law Journal County Court Appeal Reports*. One is inclined to wonder what are the criteria applied in selecting the important from the less important cases in law reporting.

The defendant, Galley, was a deputy employed by the N.C.B. at a colliery in Derbyshire, and a member of the National Association of Colliery Overmen, Deputies, and Shotfirers (Midlands Area) which was collectively a member of the National Association of Colliery Overmen, Deputies, and Shotfirers (Nacods). The defendant had a written contract of employment with the plaintiffs, dated March 1, 1949, by which he agreed to serve the plaintiffs and declared that

> "my wages shall be regulated by such national agreement and the county wages agreement for the time being in force and that this contract of service shall be subject to those agreements and to any other agreements relating to it in connection with or subsidiary to the wages agreement. . . ."

In the spring of 1947 the five-day week had been introduced for deputies as well as for miners, but, later in that year, under circumstances which are within most people's vivid memories, these agreements were supplemented by those for the voluntary Saturday shift with overtime pay. These agreements were renewed until April, 1952. A new agreement for Saturday shifts (this time not as hitherto only for the winter but also for the summer months) was made between the N.C.B. and the National Union of Mineworkers in August, 1952, and has been regularly renewed since that time.

The present case arose from the interpretation of the agreements made between the National Coal Board and Nacods in the summer of 1952 concerning the wages and other conditions of employment of the colliery deputies. By an agreement of July 29, 1952, the

[1] [1958] 1 W.L.R. 16.
[2] (1935) 1 L.J.N.C.C.A. 284.

payment by shifts was replaced by that of weekly wages, but it was agreed that a deputy should only work such days or parts of days as management should "reasonably" require in order to promote the safety and efficient working of the pit and to comply with statutory requirements. It was further agreed that records should be kept to show the number of days or part-days worked by each deputy. In August of the same year the voluntary Saturday shift was reintroduced for deputies as well as for miners, and, on the basis of these agreements, the defendant as well as other deputies worked the Saturday shift until the spring of 1956.

In the spring of 1956 difficulties had arisen between the National Coal Board and the deputies through dissatisfaction caused by the dwindling of differentials. On April 28 and the three following Saturdays the deputies at the colliery refused to work Saturday shifts which accordingly had to be cancelled. Saturday shifts had to be cancelled for the same reason from June 16 to August 18. From the following Saturday the management had arranged for substitute deputies, at a cost of £3 18s. 2d. for each shift. The deputies resumed Saturday work in February, 1957. On June 16, 1956, the loss of production was £535, and for the Saturdays from June 23 to August 18, £3,395.

The writ in the present action (which was a friendly action affecting not only the defendant but eighty-five deputies who had also been sued) was issued on June 21, 1956, for damages for breach of contract by not working the Saturday shift. One of the important points decided by the Court of Appeal was that a breach of a contract of employment is not a "continuing cause of action" within the meaning of R.S.C., Ord. 36, r. 58, so that (contrary to the view taken by Finnemore J. at the Nottingham Assizes) the court could not take into account any breaches committed after the date of the issue of the writ. "A continuing cause of action is not . . . constituted by repeated breaches of recurring obligations nor by intermittent breaches of a continuing obligation. There must be a quality of continuance both in the breach and in the obligation." [3]

Was the defendant, by virtue of his contract of employment, liable to work the Saturday shift on June 16, 1956?

It is possible to dissect this question as follows: (a) Did the defendant's contract of employment of 1949 incorporate the terms of subsequent collective agreements between the National Coal Board and Nacods, including those of an agreement as fundamental as that of 1952 which replaced shift pay by weekly pay? (b) Alternatively, did the defendant, by working the Saturday shifts after 1952 as part of the consideration for his weekly pay, tacitly agree with the plaintiffs upon a change in the terms of his employment?

[3] *Per* Pearce L.J., delivering the judgment of the court, at p. 27.

(c) Was the agreement of 1952 intended to impose binding obligations upon the deputies? (d) Was the request to work the Saturday shifts "reasonable"? Lastly, there was the question of damages.

These were the questions before the court, but in addition to these another question was also ventilated which the court, wisely perhaps from its point of view, but regrettably from the point of view of those interested in the development of the law, refused to decide, pointing out (a judicial and judicious under-statement) that it was "a matter of some difficulty": Was the defendant as a member of Nacods "directly bound" by the 1952 agreement? Was he a party to this agreement? Was it a contract concluded with the National Coal Board by Nacods as agent for its members? If the court had dealt with this matter, it would, in the first place, have had to say whether the collective agreement was a contract at all or an agreement not intended to have any contractual effect. If the court had affirmed the contractual character of the collective agreement (for which there is no precedent in this country), it would have had to choose between the "agency" and the "corporate" interpretations of collective bargaining, *i.e.*, it would have had to say whether Nacods "contracted" with the National Coal Board as a principal or as an agent for its members. In the present writer's opinion the latter view is wrong because it is not in accordance with the intention of the parties, because it leads to unending difficulties in practice, and because it runs counter to the very nature of collective bargaining. However, the court was not compelled to decide these points and did not do so. The two questions whether the agreement was a contract binding the defendant and whether its terms were by its parties intended to bind the parties to the contracts of employment when incorporated in those contracts were not as clearly distinguished as might have been desirable, and there appears to have been a certain confusion in the use of the word "binding" throughout the case. At one point the fact that the defendant voted against the 1952 agreement (inside the union) seems to have been produced by the plaintiff as a matter of relevance which obviously it could have been only if the case had had to be decided on the contractual nature of the collective agreement and if the court had considered the union as an agent for its members.

The court answered all the four questions formulated above in the affirmative, and rightly so, it is respectfully submitted. It therefore held that the defendant was liable in damages for breach of contract.

As regards the first question, it is submitted that the answer might have had to be the same even if the contract of 1949 had not in terms referred to agreements "for the time being in force." Employers and employees can, in the absence of an express contractual term or implied usage to the contrary, be assumed

to have contracted on the basis not of the particular collective agreements in force at the time of the making of the contract of employment, but on the basis of whatever for the time being are the relevant collective agreements. The second question was not relevant if the first was answered in the affirmative, but both Finnemore J. and the Court of Appeal held that, quite apart from the terms of the contract of 1949, the defendant had, by working under the agreement, agreed to make its terms part of the contract.

It is the third question which perhaps will be regarded as the most important from the point of view of social policy. In holding that the clauses about working "at reasonable times" were not too vague to be incorporated in the contract of employment and that they were intended to impose obligations upon individual employees the court gave the sanction of the law to what is loosely called the difference between "compulsory" and "voluntary" overtime. Provided, of course, that no statutory provision is violated, it is possible for the parties to a collective agreement to impose upon employees an obligation to work overtime at the employer's request. If such a term of a collective agreement becomes a term of the contract of employment by express or implied incorporation the employee breaks his contract by refusing to work overtime. On the facts of the case the court concluded that the request to work twelve days in a fortnight was "reasonable."

What was the measure of damages? If an employee breaks his contract of employment he is, like any contracting party, liable (within the rules as to remoteness of damage) to put the other party, *i.e.*, the employer, into the position in which he would have been had the contract been duly performed. But how does one measure the loss suffered by an employer as a result of the breach of his contract by an employee? It may be, and very frequently will be, impossible to show that the profits made by the employer were reduced by a penny as a result of a worker having absented himself for a day. This is why the courts have resorted to the somewhat crude but perhaps inevitable remedy of making the cost of a substitute the standard of measurement of the employer's loss. Where, however, the role of the employee in the productive process is such that a quantifiable share in the output of the end product can be attributed to him, as, *e.g.*, in the case of a coalminer (a situation which, from the point of view of the economy as a whole, is rather exceptional), the court can say that the value to the employer of the output not produced by the employee is the measure of the employer's damage, and this is the effect of the ruling in *Tew's* case. In that case the Court of Appeal rejected both the "theory . . . that the damage was the workman's aliquot share of certain overhead expenses without regard to the extent to which that share would or would not have been recovered or recouped

by the workman's work had he performed the contract" and the "theory . . . that the net profit upon the coal he would have raised was the limit of the damages." The ruling of the court in *Tew's* case was that the judge should ascertain "the probable output of the defaulting workmen . . . during the time of default." "Then he should ascertain the gross or selling value or money proceeds to the employers of that output and deduct from the figure so obtained the further expenses, such as the workman's wages. . . . But overhead expenses or any expenses which were properly incurred, whether the workman . . . worked or not, should not be deducted from the proceeds." The employer's loss, then, is the amount of gross profits which he would have made on that quantity of the end product which would have been the workman's output had he performed his contract. Obviously this theory may work in the extractive industries and in agriculture, but not, *e.g.*, in the manufacture of products which have to go through many stages of production in which many workmen participate, or in transport.

The present case showed that it will not even always work in an extractive industry. The defendant was, as a deputy, engaged on supervisory and safety work. No output of coal was directly attributable to him in contradistinction to a miner such as Tew. Indeed, in the *Tew* case Roche L.J., who delivered the judgment of the Court of Appeal, had already pointed out that the ruling in that case would not apply where no quota of output was "referable to the particular workman." Could it then, in *Galley's* case, be said that each shotfirer or deputy was responsible for the entire output lost by the inability of the pit management to work the Saturday shifts in question? Finnemore J. thought so, but the Court of Appeal held that this loss could only have been recovered in an action for conspiracy or inducement to break a contract. In the action for breach of contract the fact that the defendant acted in concert with the other deputies was irrelevant. "Prima facie, the measure of damages cannot be different because when he broke his contract in this respect he knew that his fellow deputies intended to commit similar breaches. . . ." In these circumstances the Court of Appeal decided to fall back upon the last line of defence which the courts have built for themselves in such cases, and assessed the damages on the basis of the cost of a substitute, *i.e.*, £3 18s. 2d.

The question of the measure of damages for breach of contract should be much more fully investigated than has happened in the past. This should, and could only, be done, however, by the conjoint efforts of lawyers and accountants or economists.

O. K.-F.

Equitable Relief in Hire Purchase: A Rejoinder

In an article entitled "Equitable Relief for the Purchaser of Hire-Purchase Goods" [1] I suggested that the courts have power to grant relief in accordance with equitable principles in actions to recover possession of goods let on hire-purchase terms. This power exists, I thought, whether the owner is seeking to recover the goods from the hirer himself or from an innocent "purchaser" from the hirer. Mr. Prince now argues that there is, in fact, no such power.[2]

It seems to me that there are two points at issue. I suggested that the distinction between a hire-purchase agreement and a contract for the sale of goods was not, for this purpose, of importance; Mr. Prince disagrees. All I would now add to what I wrote previously is that, whatever the legal forms adopted, the real object of the hire-purchase agreement (including the financial aspects) is, so far as both parties are concerned, identical with that of the credit-sale agreement.[3] The reason for preferring the hire-purchase agreement is the fact that section 25 (2) of the Sale of Goods Act, 1893, is thereby evaded, so that the owner's security is enhanced.

Recognition of the court's power to grant equitable relief in credit-sale agreements is a recent development.[4] I merely suggest that the similarity between the two types of transactions is so great that, unless prevented by clear authority to the contrary, the courts might be prepared to apply similar rules; after all, there are signs that judges are prepared to recognise the economic realities of the hire-purchase agreement.[5]

The second point at issue is whether there is this clear authority to the contrary: whether there is, in fact, any binding decision which would prevent a court from granting equitable relief. Mr. Prince does not, in his article, quarrel with my argument that

1 (1956) 19 M.L.R. 498.

2 "Equitable Relief in the Law of Hire-Purchase," by Edwin J. Prince: (1957) 20 M.L.R. 620.

3 It is hardly surprising that a lay author seeks to distinguish between hire purchase and the sale of goods on credit by describing a hire-purchase agreement in terms which, to a lawyer, would refer to a credit sale: *Hire-Purchase*, by Aylmer Vallance, pp. 16–17.

4 *Stockloser* v. *Johnson* [1954] 1 Q.B. 476, C.A. The authorities relied on by the majority of the court all concerned the sale of *land* on credit terms (and Denning L.J. even referred to the transaction in *Steedman* v. *Drinkle* [1916] A.C. 275, P.C., as "a hire-purchase agreement of land"—[1954] 1 Q.B. at p. 490; it would more accurately be described as a credit-sale agreement).

5 See, for example, *Karflex, Ltd.* v. *Poole* [1933] 2 K.B. 251, 263–264, *per* Goddard J.; *Felstone Tile Co., Ltd.* v. *Winget, Ltd.* [1936] 3 All E.R. 473, C.A. (probably wrong in law: see the criticism in the *County Court Practice, 1957*, p. 1432); *Warman* v. *Southern Counties Car Finance Corporation, Ltd.* [1949] 2 K.B. 576, 582, *per* Finnemore J.; *Andrews* v. *Hopkinson* [1957] 1 Q.B. 229, 237, *per* McNair J.

Cramer v. *Giles*,[6] the case usually cited [7] for the proposition that there is no equitable relief, is no authority on this point. Instead, he cites three cases [8] (two of which I did not refer to) which "clearly establish" that no relief is possible.

My only comment here is that in none of these cases was it argued, whether in general terms or by analogy to the sale of goods or the sale of land or leases of land, that the court had an equitable power, and in none of these cases does the decision reject, or, indeed, refer to, such a power. The cases were argued purely on common law principles.

At first sight the quotation from *South Bedfordshire Electrical Finance, Ltd.* v. *Bryant*,[9] given by Mr. Prince,[10] appears to support his contention. Greer L.J. said: ". . . if we were entitled to exercise our judgment by reason of our sympathies with the unfortunate defendant . . . we might think there was a great deal to be said for the unfortunate defendant." [11] Mr. Prince claims that this "can only be consistent with there being no power in the court to grant equitable relief in such a case." But his quotation ends with the following words of Greer L.J.: "Unfortunately, however, we have merely to consider the agreement between the parties *having regard to the facts that were before the* [*county court*] *judge*." [12] While it may well be that Greer L.J. did not think there was any power to grant equitable relief,[13] the case was argued solely on the effect *at law* of an unsatisfied judgment for arrears of instalments in an earlier action between the same parties.[14]

If this case, or any of the other cases referred to by Mr. Prince, is to be regarded as "clearly establishing" the rule, then the contention must be that the rule is to be found as one of the *rationes decidendi* of the case. But it must be clear that the *ratio*

[6] (1883) Cab. & El. 151; affirmed *sub nom. Cramer* v. *Carlton*, *The Times*, May 9, 1884.

[7] See the works referred to in (1956) 19 M.L.R. p. 503, n. 6; and also Dunstan, *The Law Relating to Hire-Purchase*, 4th ed. (by E. Holroyd Pearce and R. Ormrod), p. 51; Park, *Hire-Purchase and Credit Sales*, p. 13.

[8] *Brooks* v. *Beirnstein* [1909] 1 K.B. 98, D.C.; *South Bedfordshire Electrical Finance, Ltd.* v. *Bryant* [1938] 3 All E.R. 580, C.A.; *United Dominions Trust (Commercial), Ltd.* v. *Parkway Motors, Ltd.* [1955] 1 W.L.R. 719, Q.B.D.

[9] [1938] 3 All E.R. 580, C.A.

[10] (1957) 20 M.L.R. at p. 622.

[11] [1938] 3 All E.R. at p. 581.

[12] *Ibid.* My italics. A point of law not argued in the county court cannot be raised for the first time in the Court of Appeal: *Jay's Furnishing Co.* v. *Brand & Co.* [1915] 1 K.B. 458, 463, C.A.; *United Dominions Trust, Ltd.* v. *Bycroft* [1954] 1 W.L.R. 1345, C.A.

[13] *Stockloser* v. *Johnson* was not to be decided until sixteen years later.

[14] Neither Slesser L.J. nor MacKinnon L.J., the other members of the court, expressed sympathy with the defendant. Indeed, MacKinnon L.J. said (at p. 584): ". . . if anybody is so foolish as to enter into an agreement such as this, I do not know that his case can be considered harsh." This is particularly revealing when it is recalled that the Hire-Purchase Act, 1938, received the Royal Assent only a fortnight later.

decidendi of a case cannot be a proposition that is neither argued by counsel nor referred to by the judge: "A case is not a precedent for any proposition that was neither consciously nor unconsciously in the mind of the court." [15] To quote an English judge: "A case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it." [16]

My contention, therefore, remains that it is perfectly possible for the courts today to grant equitable relief in accordance with the principles laid down in *Stockloser* v. *Johnson*.[17] It seems to be generally agreed that the present position at law produces hard cases.[18] Equitable relief might produce a solution to the "present one-sided rules" and introduce at least a measure of apportionment.[19]

It may be that when the point is argued the courts will disclaim the equitable power. In that case the solution must await legislation, probably on the lines of the Hire-purchase Agreements Act, 1941, of New South Wales.[20] But personally I think it would be a great pity if opportunity to argue the question were never taken, so that the argument failed by default. "Hire-purchase is a very modern development in commercial life, and surely it is a commonplace in commercial law that . . . the law has to be moulded and developed to meet the commercial developments which are taking place." [21]

Aubrey L. Diamond.

[15] Wambaugh, *The Study of Cases*, 2nd ed., p. 24.
[16] *Quinn* v. *Leatham* [1901] A.C. 495, *per* Lord Halsbury L.C. at p. 506. See the discussion of "precedents *sub silentio*" by Dr. Glanville Williams (1944) 7 M.L.R. pp. 136–137, n. 43.
[17] [1954] 1 Q.B. 476, C.A.
[18] Mr. Prince concedes that the decision in *United Dominions Trust (Commercial), Ltd.* v. *Parkway Motors, Ltd.* "did not produce the fairest of results." See, too, the concluding paragraph of the judgment of the Court of Appeal in *Eastern Distributors, Ltd.* v. *Goldring* [1957] 2 Q.B. 600, 614–615, partly cited by Professor Powell at (1957) 20 M.L.R. p. 655.
[19] See the suggestion of Professor Powell (1957) 20 M.L.R. at p. 655.
[20] *Cf.* Williston on *Contracts*, revised ed., 1936, § 736, p. 2090.
[21] *Karflex* v. *Poole* [1933] 2 K.B. 251, *per* Goddard J. (as he then was) at p. 263.

REVIEWS

DIVORCE IN ENGLAND. By O. R. McGREGOR. [London: Heinemann. 220 pp. 18s. net.]

A CENTURY OF FAMILY LAW. Edited by R. H. GRAVESON and F. R. CRANE. [London: Sweet & Maxwell, Ltd. 459 pp. 35s. net.]

THE history of divorce law in England, lucidly summarised by Mr. McGregor in his first chapter, shows how its development has taken place in an atmosphere for the most part of indignation, fear, suspicion, and prejudice, all of which have been largely the result of ignorance. Mr. McGregor's book is concerned with these matters. It is, he says, "a polemic against prejudice and ignorance." His analysis of history and available statistics is designed first, to point out the present lack of and need for proper sociological investigation of divorce: and secondly, to show that such an investigation, judging by what can be said on the basis of existing information, would belie many of the fears, and make nonsense of much of the dubious "sentimental moralising" (the phrase is Mr. McGregor's), which present ignorance has produced. There is general ignorance of the true causes of the increase in divorce since 1900; there is misunderstanding of the character and origins of what Mr. McGregor calls "the new democratic family unit" (which, whatever else it may be, is far different from what people happily, though wrongly, imagine the Victorian family to have been); there is disregard of the evidence which does exist, evidence contained in the statistics (albeit necessarily incomplete) which Mr. McGregor discusses in Chapter 2. Above all, it seems to be implicit in Mr. McGregor's thesis, there is an "upper class" bias which operates on the minds of many, if not most, of those who talk about the problem of divorce in present-day England.

All these facets of Mr. McGregor's thesis are strongly revealed in his discussion of the evidence given to the recent Royal Commission on Marriage and Divorce, and the Report of that Commission. Thus, Mr. McGregor divides those who gave evidence before the Commission into "abolitionists" and "institutionalists"; the former are people who wished to make away with the necessity for proving a matrimonial offence in order to obtain a divorce; the latter are those who insisted on its retention. The background to the appointment of the Commission shows the relevance of this distinction; for the Commission was set up as a result of Mrs. Eirene White's attempt to introduce seven years' separation as a ground of divorce (an "abolitionist" approach). The opposition of many influential people to such a measure provided the *raison d'être* of the Commission. However, while the Government were eager to select the members of the Commission from men and women who, as Mr. McGregor puts it, "were not publicly committed to either 'abolitionist' or 'institutionalist' views," they failed to appoint a Commission competent to investigate. It was not competent, says Mr. McGregor, because there was not even one professional social scientist on the Commission, nor did any Commissioner possess expert knowledge of "the considerable body of modern sociological research on the causes and social consequences of divorce and the implication of changing attitudes to marriage" (including, according to Mr. McGregor's figures, its greater popularity, especially among the young!); nor was any Commissioner "equipped with an understanding of the techniques and potentialities of social investigations developed during the last twenty

years." Indeed, says Mr. McGregor, the Commissioners "ignored a century's development of the social sciences," and went so far as to add insult to injury (as Mr. McGregor might have said, but did not), by printing diagrams and tables in the addenda to the Report without making any reference to them in the text, and without making any suggestions for the improvement of the statistics of divorce. The Commission, in Mr. McGregor's view, and this is the gravamen of his charge, was prejudiced against the possibilities of accurate sociological research on this question. This was the result of the domination of the Commission by lawyers, who, to quote the pejorative language of Mr. McGregor, "whilst paying lip service to the need for judging proposals by the test of social good, are conditioned to define both social problems and the social good in legal terms."

In this unfortunate approach to the inquiry, the Commission, according to Mr. McGregor's account, was admirably assisted by many of the witnesses, in particular the representatives of the General Council of the Bar, whose evidence is scornfully analysed and criticised on pages 136–141. But lawyers, although the main object of Mr. McGregor's dislike, at least so far as the question of divorce is concerned, are not the only people to be criticised by him. Everybody who adopted the "institutionalist" viewpoint comes under the same attack; and for the same reason, namely that they gave not facts but opinions about the opinions of the other witnesses, not informative statistics and reasoned conclusions based thereon, but "endless conjecture." He sums it all up by saying that the Commission's search for evidence has produced "one of the most impressive collections of unsupported cliche [*sic*] ever subsidised by the taxpayer."

These examples of the strong language used by Mr. McGregor make it almost supererogatory to say that he is an "abolitionist." But I do not mean to suggest that Mr. McGregor is as prejudiced as the people he criticises; he is simply prejudiced in another way. The only question is whether his form of prejudice is more justified and acceptable than that of the others. This question can only be answered by someone who has had an opportunity of reading Mr. McGregor's book: and everybody interested in the problem of divorce should certainly avail himself or herself of the opportunity.

After the polemics of Mr. McGregor it is soothing, at any rate for the plain, humdrum lawyer, to turn to the more technical, and more scholarly, though not less readable collection of essays edited by Professors Graveson and Crane. There is little that is controversial in *A Century of Family Law*: whatever controversial matter there may be in the book is controversial only in the sense that there may be differences of opinion among lawyers about certain technical points of law. But this book is not designed, as is Mr. McGregor's, to highlight and possibly increase public controversy about one aspect of the law's activity. Its aims are to be historical and descriptive rather than argumentative, to provide information about the law rather than to be critical of the law and its effects on society. It achieves these aims admirably. As Lord Evershed says in his Preface, the book is "a work of scholarship," and excellent scholarship at that. But it is neither pedantic nor is it turgidly written. The English is lucid and attractive; the information is given succinctly but not uninterestingly. So much is this so that it seems very likely that it will fulfil the editors' hopes and become a book for the general lay public as well as for the professional lawyer and the law student. Some chapters, such as those of Professor Graveson on the general background of the developments from 1857 to 1957, and the future prospects of family law, and that of Mr. Stevas on *Women in Public Law*, certainly seem suitable for digestion by non-technically minded readers: the others, however, appear to be more intelligible to the professional lawyer.

There can be little doubt as to the book's utility for the latter class of readers. In one volume is conveniently collected together all the law relating to the family and the individuals who make up the family. The scope of the

book is much wider than that of Mr. McGregor. The latter is only concerned with the present working and possible future development of the law of divorce: but the authors of the essays in *A Century of Family Law* cover a variety of topics which take the reader through almost every important aspect of English law, tort, contract, property, criminal law, as well as matrimonial law, and what may be called family law proper (for example, legitimacy, adoption, guardianship of infants). The book is not meant to be a textbook: that is clear. On the other hand, it does provide a general overall and sometimes detailed picture of the law affecting family relationships and members of the family. Indeed, some of the topics discussed in these essays receive fuller treatment than can be found in a good many more specialised textbooks, for example, Mr. Da Costa's discussion of husband and wife in the law of larceny. But the great value of the book is not so much the detail it provides, useful though that is, as the completeness of the picture it provides. And in this respect despite the technicality of the matters discussed, it may be of value to readers who are not lawyers, but who are interested in obtaining some knowledge of the way in which English law has grappled with the special problems of family relationships in a changing society.

Occasionally there is overlapping, such as occurs on the topic of contracts in restraint of marriage, dealt with by Mr. James (pp. 36–38) and by Mr. Morrison (pp. 136–139). But this, though possibly to be expected in a work of such breadth, is rare. Rare, too, are omissions and mistakes, though some occur, such as the omission of *Biberfeld* v. *Berens* from Mr. Morrison's discussion of a husband's liability for necessaries obtained by his wife, and Mr. Davies's statement that in 1892 Asquith was Prime Minister. Moreover, there is room for disagreement about Mr. Stevas's factitious remark on page 270 on the progressiveness of Cambridge as against Oxford. But, apart from such infelicities the book is to be recommended to practitioners and students of law, whether intending practitioner or otherwise interested in obtaining knowledge of the law involving the family. Indeed, the learned editors are to be congratulated on their imagination in producing such a work, and on the skilful way in which they have harnessed their team of authors and used them to plough over the ground to such fruitful effect.

G. H. L. Fridman.

The Law of Real Property. By R. E. Megarry, Q.C., M.A., LL.B. and H. W. R. Wade, M.A. [London: Stevens & Sons, Ltd. 1957. lxxxiii, 999 and 33 pp. £3 3s. net.]

This book will not seem altogether strange to those who know Mr. Megarry's *Manual of the Law of Real Property* for it adopts the same excellent arrangement of the subject-matter and much of the text has a familiar ring. It is, however, as we have been led to expect, a work on a considerably larger scale, and a rough calculation indicates that while the text is only about half as long again as in the *Manual*, the number of authorities cited has been nearly trebled, and on the average not one or two lines but approximately a quarter of each page consists of footnotes, which include numerous references to periodical literature. Personally, I regard this work as a most valuable addition to my library, and I feel confident that it will rapidly become regarded as the leading textbook on the subject. It appears from the preface, however, that the book is intended, *inter alios*, for students: nevertheless, it does not seem to me that it is suitable to be recommended as a students' textbook to any but the potential first, though it will obviously be recommended as a book of reference. This is not a criticism of the book, which in general is admirable in its clarity; nor, indeed, is it so much a reflection upon the average student, as a recognition of the limits of what he can reasonably be expected to absorb in the time available in the average real property course.

On the general scheme and arrangement of the book, it seems to me to be a mistake to include Chapters 8, 9 and 10 on Trusts and Powers, Wills and Intestacy, and Contracts and Conveyancing, respectively. Excellent summaries though these chapters are, it is obviously impossible that they should deal with their respective subject-matters in anything like the detail with which what may, perhaps, be called the genuine real property topics are considered, and it is submitted that their unnecessary inclusion upsets the balance of the book.

The merits of the book are such that it deserves as detailed a criticism as space will permit: I shall endeavour to group criticisms of the same type together.

First, the number of trivial mistakes in the names of the parties to, or references to, cases, which I noticed, suggests that there may be an undue number of such errors. Thus, on p. 173 the case is *Goodright d. Larmer* (not *Larner*) v. *Searle*; on p. 213, *Taylor d. Smith* v. *Biddall* is reported in 2 Mod. at p. 289 not 287; on p. 379, *Lake* v. *Craddock* is reported in 3 not 2 P.Wms.; on p. 508, *Chipperfield* v. *Carter* is reported in 72 not 75 L.T.; on p. 576 the case is *Doe d. Rigge* (not *Riggs*) v. *Bell*; on p. 711, the case is *Leech* (not *Leaeh*) v. *Schweder*; on p. 714 *Dyce* v. *Lady James Hay* is reported in 1 Macq. at 305 not 205; and on p. 742, the case is *Godwin* (not *Goodwin*) v. *Schweppes, Ltd.* Further, on p. 287, n. 12 refers to 291 instead of 292; and on p. 992, n. 8 refers to 839 instead of 639. Another point is that the references to *Forster* v. *Elvet Colliery Co., Ltd.*, at pp. 670 and 678, do not mention the affirmation of the Court of Appeal decision by the House of Lords *sub nom. Dyson* v. *Forster*, and the uninitiated would assume that *Dyson* v. *Foster* [*sic*], referred to on p. 672, was a different case. Likewise, on four out of the five occasions on which *Renals* v. *Cowlishaw* is mentioned the reference to the decision on appeal affirming the judgment of the Vice-Chancellor is not given.

Secondly, there are several instances where there is ambiguity in expression, or some obvious verbal slip or omission. Thus, on p. 170, the wording of the first two lines might be thought to suggest that there must be no intermediate interests in remainder between the prior interest in possession and the remainder under consideration, so that there could not be a series of vested remainders; on p. 213, it is at least ambiguous to say that remainders after an entail could "always" be barred by the tenant in tail; on p. 230, in line two, there was only one grandchild; on p. 240, in the bottom line, the omission of the fact that the sons also were to take at 24 makes the example incomprehensible; on p. 351, n. 1 repeats n. 2 on p. 325; on p. 400 in n. 7, A should be X, and X should be Z; on p. 420 some such words as "After 1535" seem to have been lost before the sentence beginning "Such a conveyance"; on p. 489, the top paragraph read together with n. 4 might be taken to mean that even today the executor is preferred to the Crown in the absence of contrary intention; on p. 533, in n. 9, there is an obscure reference to "the usual conditions of sale"; on p. 786, in discussing the history of mortgages of freeholds before 1926, we suddenly meet half-way down the page the surprising statement that "Mortgages are still frequently made in this cryptic form," *i.e.*, by conveyance of the fee simple with a proviso for redemption! The present tense continues, inappropriately, for most of the succeeding paragraph, and there is a similar slip in the tense on pp. 848–849; on p. 813, in the bracketed phrase, the words "for less than the mortgage debt" may give a wrong impression; on p. 825, the main paragraph should begin by referring to a lease *by the mortgagor*; on p. 828, in n. 5, line 5, *mortgagee* should read *mortgagor*; on p. 856, n. 12 is ambiguous; and on p. 901, in line 13, some such word as "because" seems to have been omitted after "continuing breaches."

Thirdly, there are some points on which criticism is not merely verbal. Near the beginning of the book, on page 15, there is a gift to the reviewer in the repetition (in distinguished company, including Littleton, Finch, Coke and Blackstone) of what Maitland called "obviously . . . an idle tale," namely, that tenure by cornage involved winding a horn on the approach of the Scots

or other enemies. In fact, in Maitland's words, it was "originally in all probability a payment of so much per horn or per head for the beasts which the tenant kept and turned out on the common pasture. But we only know it as a fixed term which does not vary from year to year." On p. 68, in regard to air space, it is submitted that whether permanent occupation constitutes nuisance or trespass depends upon whether the projection is natural or artificial; on p. 116, in n. 11, it is misleading to cite *Shropshire Union Railways and Canal Co.* v. *R.* without referring to *Walker* v. *Linom* where the beneficiaries were, in fact, postponed and the earlier case distinguished (though on grounds not beyond criticism). Conversely, with the reference to *Walker* v. *Linom*, on p. 848 in n. 2; on p. 217, the change in the wording of the first two conditions compared with p. 169 might be thought to be significant, when it is not; on pp. 231–232 the actual result of *Hopper* v. *Corporation of Liverpool* does not appear; on p. 382, at the top of the page, the legal estate will only vest in the personal representatives if there are no trustees of the will for the purposes of the Settled Land Act, 1925; on p. 413 there are trusts which do not fall happily under any of the three suggested heads in the conveyancing classification, *e.g.*, charitable trusts, notwithstanding section 29 of the Settled Land Act, 1925; on p. 456, n. 16 no longer represents the law, as the Acts referred to were repealed by the Navy and Marines (Wills) Act, 1953; on p. 507 the proposition in n. 7 is not, it is submitted, supported by the cases cited. The general position, it is suggested, was accurately and succinctly stated in the judgment of Denning L.J. (as he then was) in *Dennis Reed, Ltd.* v. *Goody* (referred to in the note) at p. 284. "The common understanding of men is, however, that the agent's commission is payable out of the purchase price." *Boots* v. *E. Christopher & Co.* [1952] 1 Q.B. 89, in which the Court of Appeal approved Lord Denning's views, might also have been cited; on p. 581, the example of an equitable interest given, a restrictive covenant, is unfortunate in view of the fact that those interests are now registrable; on p. 634, the rather unsatisfactory decision of *Taylor* v. *Webb* is accepted without comment, and no reference is made to the alternative view of Tindal C.J. in *Gutteridge* v. *Munyard* (1834) 1 Moo. & R. 334 [1]; on p. 810, the statement on limitation is dangerously inaccurate and hardly cured by the reference to the relevant part of the book on the law of limitation generally where the position is correctly stated; on p. 828, the last paragraph does not fully bring out the point clearly made by a strong Court of Appeal in the *Knightsbridge* case, namely, that the test of the validity of a postponement provision is not whether the provision is unreasonable, or whether the postponement is or is not for a reasonable time, but whether the terms are oppressive or unconscionable or fail to comply with the essential requirements of a mortgage transaction; and in p. 862, in the summary, "a (ii)" would appear to be included in "a (i)."

Fourthly, in a few places the learned authors, it is submitted, assume too great a knowledge on the part of the reader as, *e.g.*, in the illustration on p. 215, that the brothers are lives in being; on p. 289, in connection with the flaw in the operation of the curtain; on p. 416, in regard to certainty of objects as one of the "three certainties" of a trust; and on p. 584, where in discussing *Lewis* v. *Baker* it is not made clear that the sub-lease to S for more than the residue of the term of under two years operated as an assignment of that residue.

Fifthly, there are a few miscellaneous points. One might have expected to see cases such as *Re Rose* [1949] Ch. 78; *Re Rose* [1952] Ch. 499 and *Re Wale* [1956] 3 All E.R. 180 cited on p. 417; *Re Cooper's Conveyance Trusts* [1956] 3 All E.R. 28 in relation to determinable fees; and *Williams* v. *Greatrex* [1956] 2 All E.R. 705 in relation to specific performance. On certain topics, *e.g.*, the distinction between equities and equitable interests, and licences, one

[1] Since writing this review the opinion of Tindal C.J. has been applied and *Taylor* v. *Webb* distinguished by C.A. in *Brown* v. *Davies* [1957] 3 W.L.R. 818; [1957] 3 All E.R. 401.

would have welcomed a fuller discussion. Thus, the possibility of a licence giving exclusive possession is not fully considered—see pp. 571–573, 633, n. 19, and text, pp. 721–722—and in the result, though this is quite exceptional, the text may be misleading. Further, it seems to me deplorable that in a work of this calibre the table of cases is not complete with full references. And a last small point: why not relegate translations of Latin phrases tc the glossary?

Detailed criticism is bound to take up a disproportionate amount of space, and the preceding paragraphs must be read in the light of the opening one. There can be no doubt that this is a book of first-rate value and importance, and acquaintance with Mr. Megarry's other works suggests that he and his learned co-author will deal adequately with points such as those raised above in the future editions which are surely inevitable.

P. H. Pettit.

Stipulation and the Theory of Contract. By Professor Salvatore Riccobono. Translated from the Italian with notes by J. Kerr Wylie, m.a., ll.m., d.litt., late Professor of Roman Law in the University of Cape Town. Revised and edited with further notes and an introduction by B. Beinart, b.a., ll.m., Professor of Roman Law in the University of Cape Town. [Amsterdam/Cape Town: A. A. Balkema. 1957. xxiv and 239 pp. including index. 35s. net.]

As it will be obvious from the title, the history of this distinguished book is long and varied. The bulk of the text consists of two articles by Professor Riccobono which were originally published in the *Zeitschrift der Savigny Stiftung* (rom. Abt.) in 1914 (Vol. 35) and 1922 (Vol. 43) respectively, and which subsequently (1935) appeared with some alterations in a book form (printed by offset duplicating process) under the title *Corso di diritto romano: Stipulationes, contractus, pacta.* The original version was translated into English by the late Professor Wylie but it was found impossible to have it published as the theme was obviously not a commercial proposition. Upon the death of Professor Wylie, his successor in the chair of Roman law, Professor Beinart, decided to proceed with the publication as a tribute to the work of the former who had intended " to show English-speaking students the methods pursued in elucidating the law of stipulation by one of the greatest masters of our science" (p. ix). But as the translation was only a draft, it was necessary to undertake its revision. It became clear to Professor Beinart, however, that if the result were to justify the effort involved, the scope of the publication would have to be conceived on a much more ambitious scale. First, bearing in mind that a great deal of Professor Wylie's notes were intended to explain ideas with which common law students were not familiar, the learned editor decided to omit them on the ground that the work was only intended for advanced students. He incorporated in footnotes, however, those ideas which, in his view, were a positive contribution to the knowledge of the subject-matter as such. To those, Professor Beinart added his own notes, and also brought up to date the literature on the subject which had appeared since the publication of the original work. Secondly, Professor Beinart incorporated either into the text or in the form of appendices parts of Professor Riccobono's later works which appeared to have an immediate bearing upon the subject, such as passages from the *Stipulationes* or the author's views on the origin of consensual contracts in modern law. Thirdly, we have the further benefit of Professor Beinart's illuminating introduction and excursus on *causa* (pp. 140 *et seq.*). The whole project was assisted by a travelling grant which enabled Professor Beinart to visit overseas libraries and go to Italy where he had full discussions on the subject with Professor Riccobono himself, who gave his

approval to the publication as a whole, although he did not necessarily agree with all the comments of Professors Wylie and Beinart which were eventually included in the book.

Briefly, the substance of Professor Riccobono's thesis is that the stipulation was originally a solemn oral contract which had to be completed in a single act. Justinian's stipulation, on the other hand, had none of these characteristics but derived its validity from the element of consent between the contracting parties. But this was no innovation by Justinian, for ever since the reign of Diocletian the stipulation had been losing its strict form, a development which was subsequently confirmed by the reform of Emperor Leo in A.D. 472, to the effect that the stipulation could be concluded "*quibuscumque verbis*." Professor Riccobono came out strongly against the views of Gneist who, under the influence of the historical school, had maintained that the stipulation, even in later law, had essentially remained a formal contract. He emphasises the force of custom in legal development and believes that the final consensual aspect of the stipulation was an essentially Roman achievement, mainly due to the fusion of the *jus civile*, *jus gentium* and *jus honorarium*.

This short summary, of course, can hardly indicate the depth of Professor Riccobono's investigations, the skilful, indeed brilliant, use of texts, or the scholarly regard for accuracy. There is little doubt that here a master is at work who is in complete control of all his sources and of the critical apparatus of research. As an example of the very best that Romanist scholarship can offer the present thesis is outstanding. In these circumstances it is not unnatural for a reviewer to be exceedingly reluctant to offer any criticism of a work that has stood the test of time. But it would be fair to say that a great number of Romanists such as Mitteis and Collinet have not entirely accepted Professor Riccobono's final analysis. A careful reader of this book is likely to find that the learned author may be too prone to assume that various passages are interpolated or altered, *e.g.*, when he suggests that C.8,37,1 and D.2,14,7,12 have been interpolated. Again, the difference between the literal contract and the stipulation seems to be unduly minimised for it seems probable that the development of these contracts was largely parallel, the important concession of the Greek provinces in this matter being the adoption of the language of the stipulation into the written document. No doubt, ever since the third century A.D., a great deal of confusion prevailed between these contracts in matters of terminology and there is here plenty of room for different points of view. But it is clear that later Byzantine law recognised primarily the written document (*e.g.*, *Ecloga*, titles 3, 4, 9, 10), whereas the oral agreement also survived (*Epitome* xi; Μιχαὴλ Ἀτταλειάτου, Ποίημα Νομικὸν ἑ § δ). Perhaps Professor Riccobono's masterly handling of the sources might have increased the temptation to suggest a development more logical or advanced than the "irresistible," "uncontrollable" and "mysterious" forces that direct the law would warrant (pp. 213–214).

As Professor Beinart has so aptly put it (p. xxiv): "It is not easy to determine Riccobono's place in Roman legal science. His work is profound, original and of wide compass, and he certainly puts forward his theories with great skill and cogency, so as to win the admiration of all. But it would be going too far to say that his views are dominant amongst Romanists today. To some extent he has been a lone wolf. Apart from his work on certain single topics, he has in his general approach and on the subject of stipulations, run contrary to the current of modern theories. . . . He may not have convinced all or even many, but the future may yet prove him to be right. And whatever the outcome, he will certainly go down to history as one of the great Romanists of our time."

The question which will, perhaps, be uppermost in the minds of the readers of this book is, How far was the attempt as a whole to present an English translation of an old classic justified? It may be argued that the book is likely to interest the specialist in Roman law (*e.g.*, most texts are in the original

only), who, if not familiar with this specific work, is nevertheless acquainted with the method of research in that subject and with those foreign languages such as French, German and Italian in which so much of the research in question has been done. Moreover, the first essential of research in Roman law is a good library which will necessarily include a set of the *Zeitschrift der Savigny-Stiftung*. That this book succeeds in justifying itself when all *a priori* thinking would consider it a failure, is a tribute to Professor Beinart. For—short of producing his own comparative study of contracts—he has widened the horizon of the text with illuminating notes and appendices so that the final result should more appropriately be considered as a study of the stipulation as a basis of contract in general rather than a highly specialised piece of work on a traditional controversy of Roman law. But, on a wider issue, those of us who deplore the growing lack of interest in Roman law in English-speaking countries (and probably on the Continent as well, *cf.* Koshaker's *Europa und das Römische Recht*) will be grateful to Professor Beinart for his bold gesture in publishing this study. And we are especially grateful for the immense amount of work and scholarship that the task of editing alone has involved, to say nothing of his mature judgment, acute observations and profound scholarship, which are a striking feature of the composition in general and the notes in particular. In making this volume available in its present form Professor Beinart and the publishers have certainly rendered a signal service to the cause of Roman scholarship in the English-speaking world.

A. G. Chloros.

The International Protection of Trade Union Freedom. By C. Wilfred Jenks, ll.d.(Cantab.) [London: Stevens & Sons, Ltd. 1957. xl and 592 pp. £4 4s. net.]

This is a volume of formidable dimensions but its subject-matter is no less formidable and of great importance. The author is assistant Director-General of the ILO and as such is particularly well equipped to deal at first hand with the mass of material which the study of the international protection of trade union freedom necessarily entails.

The book is divided into four Parts. Part I contains a discussion of the meaning and sources of the right of freedom of association in general and for trade union purposes. Part II deals specifically with the protection of freedom of association; owing to the close connection of this right with the ILO itself this Part also contains a useful *exposé* of the structure and general influence of the ILO. (In discussing the interpretation of the relevant international instruments English lawyers will note with interest the use made in certain instances of *travaux préparatoires*.) Part III of the volume, in some ways the most interesting, attempts to describe the extent to and manner in which the guarantees and standards described in Part I are made effective in practice by means of the procedures discussed in Part II. Part IV attempts a general evaluation of the importance, significance and effectiveness of existing international guarantees, standards and procedures. As Dr. Jenks points out, during the seven years preceding 1957, 153 cases of alleged infringement of trade union rights have been referred to the Committee on Freedom of Association established by the Governing Body of the ILO and the reports relating to the bulk of these cases contain the elements of an impressive body of case law. They also provide useful material for assessing the real effectiveness of the international instruments under which these cases arise.

Dr. Jenks writes as a lawyer and as the holder of an international office of importance and responsibility. His discussion, therefore, is marked by all

the lucidity, balance and dispassionateness that one would naturally expect, and every emphasis is placed on the facts as elucidated rather than on any social or political inferences which may be drawn from them. The ordinary reader, however, be he lawyer or non-lawyer, cannot help wondering how far such international documents can possess any real precision of meaning when such a notion as freedom of association is applied indiscriminately both to countries under democratic régimes and to those, whether in the west or the east, which are subject to totalitarian or near-totalitarian régimes. Is there not a danger, by insisting on the need for universality, of producing a document which is all things to all men? Thus, in regard to the right to strike the author refers to the "formal" assurance given by the Government of the U.S.S.R. to the Freedom of Association Committee that Soviet legislation does not provide any sanction in respect of a collective stoppage of work, and the recommendation of the Committee to that Government that it should make that fact generally known to the workers concerned. One does not, of course, criticise the author for informing us as to these interesting facts but can one refrain from reflecting on what possible relation these facts bear to reality? It is only fair, however, in this connection to point out that the author himself in his concluding Part emphasises the extent to which guarantees of freedom of association for trade union purposes depend on the degree of protection accorded to civil liberties in general.

An English lawyer is likely also to be particularly struck by the main omission in the subject-matter of the present volume, namely, the protection of the union member against unfair treatment by his union. This is no criticism of the present book since it is clear that in the international sphere it has not so far proved practicable to move from the arena of the general protection of trade union rights into the narrower, but hardly less vital, field of the protection of the individual members. It is plain, indeed, from the massive material elucidated in this volume that the ILO has enough on its plate already without seeking to embark precipitately on this further chapter of trade union affairs. In a sense, therefore, to an English lawyer the content of this volume might seem at first blush a little remote from his own law, since the matters discussed in it have now been reasonably clearly resolved so far as this country is concerned for three-quarters of a century. Nevertheless, the state of labour relations in the world at large is one of very real general concern and may have far-reaching effects on international relations, and one cannot, therefore, but welcome this clear and detailed account of the present state of international law and practice in such matters from one who is in a position to write with authority and impartiality.

Dennis Lloyd.

Deutschlands Ostproblem. Eine Untersuchung der Beziehungen des deutschen Volkes zu seinen östlichen Nachbarn. Herausgegeben vom Göttinger Arbeitskreis. [Würzburg: Holzner-Verlag. 1957. 220 pp. 9 DM.]

The first chapter of this work, comprising some thirty pages, consists of an essay by Professor Herbert Kraus of Göttingen on the legal aspects of the ill-famed Oder-Neisse-line. During the Potsdam conference the Russian negotiators suddenly revealed to the representatives of the Western powers that they had entrusted the administration of the former German territories east of the Oder-Neisse-line to the Polish Government, headed by the Communist leader Bierut. They, as well as the Polish leaders, assured the British and American ministers that the majority of the German inhabitants of the districts in question had fled before the Russian armies from these territories. Relying on these assertions, which in fact were completely untrue, agreement

was reached that Poland should "administer" the territories in question. Notwithstanding considerable pressure exerted on them, the Western representatives did not, however, agree that the Oder-Neisse-line should constitute the definite western frontier of Poland. The final determination of this frontier was therefore by an express provision in the official Report on the Conference left to the eventual peace conference which has so far not taken place and is obviously not likely to take place in the near future. The Polish "administrators," however, immediately proceeded with the wholesale expulsion of millions of Germans from the territories in question, in which today merely a fraction of the former German inhabitants has remained. It is probably sufficient to state these undisputed facts in order to realise that the learned author did not have a very difficult task in showing that both the events which led to the present position and the latter itself are utterly unlawful. Indeed, one might well wonder whether international law would deserve that amount of moral recognition which it still receives, if it were possible for any impartial observer to come to different conclusions. In fact, the author may well be said to have seriously understated his case in more than one respect. Thus, he mentions the mass expulsions without any reference to the fact that they were accompanied by the total expropriation of all but a trifling part of the possessions of all expellees, with the consequence that the entire burden of maintaining millions of unfortunate victims was thrown upon the economy of the Control-Commission administering West and Central German territory. Nor does he refer to the Genocide Convention or to the fact that numerous judgments of International Military Tribunals since 1945 have declared mass deportations of civilians as war crimes. Such restraint may be understandable in the case of a German writer like Professor Kraus who is admittedly conscious of the terrible record of the Nazi administration of Poland. Those, however, who know that no crime can ever justify the commission of another crime—not even of a crime of the very same type—will have to agree with President Truman who referred to the events in question as an "outrage."

Both Professor Kraus' contribution and the rest of the work which deals with aspects outside the sphere of this *Review* are characterised by a calm detachment which may well be called admirable in the face of the stark facts at issue.

E. J. Cohn.

British Nationality Law. By J. Mervyn Jones. Revised Edition. [Oxford: Clarendon Press. 1956. xxvii and 306 pp. 45s. net.]

It is a matter of deep regret that this review (the publication of which was accidentally delayed for a considerable period) appears after the death of Dr. Mervyn Jones and must, therefore, constitute something in the nature of an obituary. That it is written by one who cannot claim intimate knowledge of the man rather than the writer is another accident which, it is hoped, readers will forgive.

Those who had the good fortune of knowing Dr. Mervyn Jones will lament the passing of an attractive personality and of a scholar of considerable distinction and achievement. Over the years he published not only a number of articles, but also two significant books on *Full Powers and Ratification* (1946) and *British Nationality, Law and Practice* (1947); the second and revised edition of the latter book provides the opportunity for this review. Although, in 1939, he had written for the Cambridge University Settlement a pamphlet on *Free Legal Advice in England and Wales*, it was mainly in the field of public international law that he gathered practical experience and that intellectual

stimulation which led him to research of high academic quality. He was genuinely devoted to the clarification of the legal aspects of international life; semi-political topics or polemical discussions did not attract him. There are, in this country, far too few who are prepared to nail their colours to the frequently unrewarding mast of the theory of international law. Dr. Mervyn Jones' premature death leaves a gap which we can ill afford.

His last work fully confirms these impressions. For many years the law of British nationality had been sadly neglected by academic writers and the need for an authoritative modern textbook was obvious. Dr. Mervyn Jones' book on *British Nationality* was, therefore, a most welcome gift, but, notwithstanding its high quality, it had the unusual and unfortunate fate of becoming obsolete almost immediately after its publication, for on January 1, 1949, the British Nationality Act, 1948, came into force and effected such revolutionary changes that much of the original text was thereafter only of historical interest. Accordingly, the author was compelled to write what, to all intents and purposes, is a new book. But it is a book which will be found no less valuable than the first edition. For years to come it is assured of usefulness and will justifiably be regarded as a reliable guide and an unfailing source of information.

The work is divided into four parts which are followed by thirteen appendices. The first part deals with nationality in international law; the second contains an historical survey of the evolution of British nationality law from *Calvin's* case to the Act of 1948; the third is headed "Commonwealth Citizenship" and includes, in particular, a detailed commentary on the Act of 1948; the fourth part analyses the term British nationals, which continues to form the basis for protection by Her Majesty's Government.

It would be ungracious to argue about the views of an author who cannot answer. There is, in fact, nothing in this book that provokes criticism (though not all of Dr. Mervyn Jones' submissions will meet with general approval) and there is much that merits unqualified praise. It is a book written in a style of great lucidity. It makes full use of the available material. It offers real help to all those who search for the solution of a particular problem. Its arguments are put forward with a due sense of responsibility and detachment. Its reasoning is founded on good sense and deserves close attention even where it does not convince. In short, it will keep its author's memory alive and assure him of a permanent and honourable place in English legal literature.

F. A. Mann.

Williams on Title. Second Edition. By W. J. Williams, B.A. [London: Butterworth & Co. (Publishers), Ltd. 1957. clxi and 832 and (index) 39 pp. 95s. net.]

The full name of this textbook is *The Law and Practice relating to the Contract for Sale of Land and the Title to Land*, but it has become generally known for short as *Williams on Title* and considering that the first edition was published as relatively recently as 1948 it is testimony to the fact that the short appellation on the spine of the work has already acquired colloquial currency, just as it has established for itself a firm place in the law library of today. Bearing in mind the primacy of the position which the law of vendor and purchaser of land takes in the everyday practice of the profession, it is somewhat surprising how comparatively few are the textbooks dealing with the subject. Of the older works brought beyond the 1925 property legislation, those of Dart and the author's namesake, Williams' *Vendor and Purchaser* are pre-eminent, but neither is now up to date. Other books of lesser dimensions have appeared, but the work in review broke new ground

as the first expansive textbook by conveyancing counsel devoted to the subject compiled since the 1925 property legislation came into force. It immediately won its way into widespread approval, not only by reason of its comprehensiveness, but because of the happy knack evinced of combining the exposition of theory with the illustrations of practice, and prevalent practice is shown whether it exemplifies or contrasts with theory, for that is just what the practitioner needs. Tradition plays so great a part in the upbuilding of the practice of conveyancing, that it is appropriate to bear in mind that the learned author is the conveyancing editor of the third edition of the *Encyclopedia of Forms and Precedents*, and notwithstanding the accumulated ingathering of the technology of conveyancing methods of other conveyancers which such responsible editorial work presents, Mr. W. J. Williams struck out a path of his own in creating what very rapidly became a standard work in the sphere of leading textbooks of practical utility.

An excellent instance of its characteristic practicality is to be found in the note on page 356 where there is a full discussion with ample illustration of appropriation by way of assent. Indeed, Chapter 23, dealing with "Personal Representatives," is a masterly exposition of the subject, with an abundance of expository authorities and statements of conveyancers' practice. One would refer particularly to the discussion as to how far implication of assent is possible after 1925, a typical instance of the learned author's methods of close reasoning. The practitioner is helped at all points by passages commencing (as at p. 109) "in practice it is often found more convenient," etc. There are text writers who, while writing fully on the matters dealt with, keep to the highways of a subject but steer clear of the by-ways. Not so the learned author of *Williams on Title*. Such topics as town and country planning, the New Streets Act, 1951, requisitioned land and premises, sales by local authorities, are all treated with illustrative detail, and these are but a few typical instances of the comprehensiveness of the book. Chapter 7 devoted to preliminary inquiries is of outstanding distinction as a detailed guide to a more recent development of conveyancing practice and the following chapter on the capacity of parties is similarly exhaustive. Sometimes one finds a by-way explored with a particularity one could hardly expect in a work incidentally concerned with that matter—page 149 affords an instance, when the nature and incidents of naturalisation are expounded in Chapter 8.

Williams on Title is a work to which one can turn for information on many a subject independently of its relationship to conveyancing. Attention is directed to a very pertinent discussion as to positive covenants, their nature and the question as to whether they can run with the land (pp. 775, 776) and the learned author observes (at p. 776) that the decision of the Court of Appeal in *Smith & Snipes Hall Farm, Ltd.* v. *River Douglas Catchment Board* [1949] 2 K.B. 500, has clearly shown that section 78 of the Law of Property Act, 1925, has affected the law relating to positive covenants. He observes (at p. 775) that the view that positive covenants do not run with the land requires some slight modification. For terseness combined with inclusiveness, section VII of Chapter 8, dealing with charities, may be cited—Mr. Williams states (at p. 206) on the question of whether a given charity is or is not the subject of general exemption from the jurisdiction of the Charity Commissioners, "In practice, if there is any doubt as to the position, the views of the Commissioners are taken and accepted." The experience in this behalf of your reviewer confirms this, subject to the qualification that it is not always possible to receive a definite view from the Commissioners, nor can one complain in that respect since they regard it as a matter for the court to reconcile the complexities of such cases as *Att.-Gen.* v. *Mathieson* [1907] 2 Ch. 38, *Re Clergy Orphan Corporation* [1894] 3 Ch. 145, and *Re Stockport Ragged Schools* [1898] 2 Ch. 687. The present edition contains a new chapter devoted to the subject of estate agents' commissions. Some idea of the comprehensiveness of the work is given by the fact that the Index of cases covers over 119 pages. The Preface

contains an absorbingly interesting survey of some of the methods by which the property legislation of 1925 sought to solve pre-existing difficulties in the law of property, and the practice of conveyancing. Conveyancers have found *Williams on Title* invaluable in practice—they may usefully, at leisure, take a chapter at random and enjoy the unfolding of the law and the close reasoning of the author. No doubt supplements, as in the former edition, will keep the work up to date.

Bertram B. Benas.

Copyright and Performing Rights. By W. J. Leaper, ll.b., of the Inner Temple, Barrister-at-Law. [London: Stevens & Sons, Ltd. 1957. 305 and (index) 6 pp. 25s. net.]

This book is put forward as a practical guide on the subjects of copyright and performing rights. With this in view the author has grouped together matters relating to particular works or classes of work without particular regard to their logical relationship. Thus, in the chapter headed "Literary Work" are to be found sections sub-titled "Abridgments," "Advertisements," "Burlesques," "Compilations," "Quotations," and so forth. From a practical point of view this is, no doubt, convenient but it leads to an amalgamation of cases under one heading which are concerned with different aspects such as whether a work is original, what constitutes an infringement, and whether what would otherwise be an infringement can be justified as "fair user."

With regard to some classes of work such as, for example, "abridgments," this kind of grouping has, no doubt, some justification on historical grounds since in many of the older reports there are judicial statements in which questions of infringement are considered in the light of whether the alleged infringing material was original and whether a fair use had been made of the earlier work. The case law on the subject was undoubtedly confused and indeed the 1875 Copyright Committee proposed special legislation in regard to abridgments though this was never carried into effect. One of the best statements of the law on the subject is to be found in the judgment of an American court in the case of *Story's Executors* v. *Holcombe* (1847) 4 McLean 306. There is an interesting passage drawing a distinction between a compilation and an abridgment: "The former infringes the copyright, if matter conscribed, when published, shall impair the value of the original book: a fair abridgment, though it may injure the original, is lawful."

But at the present day it seems preferable to keep such ideas distinct. An abridgment, it is thought, will infringe the material abridged if a substantial part of the original writing is copied or imitated, notwithstanding that a great deal of labour and skill is employed in its preparation, but the abridgment may nevertheless be an original work entitled to copyright against a third party who reproduces it. And the question of fair user is normally only relevant where the special defences of fair dealing for criticism and otherwise are raised as a defence.

Again, this kind of practical approach seems also to have led the author into some confusion in the field of designs. The chapter on this subject hardly makes clear to the inexperienced reader the basic distinction between the protection given to designs under the Copyright Acts and that given under the Registered Designs Act. The important change in this field brought about by the Act of 1956 was this: prior to that Act a work was protected under the Copyright Act of 1911, notwithstanding subsequent user as an industrial design, if it had not been intended at its creation to be so used, while, if it had been so intended to be used, it could never be protected except by registration under the Designs Act. Under the Act of 1956 the design is protected as a subject-matter of artistic copyright whatever the intention of its creation, unless and until used as an industrial design and thereafter, in respect of industrial user, is only protected, if at all, under the Designs Act.

The author, having dealt with the protection of designs under the Designs Act, gives (at p. 86) examples of exceptions from protection stating these as cases of matters which will not be an infringement of copyright in the registered design. In fact, however, they are cases in which the work, having been used industrially, loses protection under the Copyright Act.

On the whole, however, an examination of the book shows that a number of interesting cases and points of practice are to found there which do not appear, at least in such detail, in other textbooks on the subject, and for these at least persons concerned with matters of copyright may well like to have this book available.

F. E. Skone James.

Carver's Carriage of Goods by Sea. Tenth Edition. By Raoul P. Colinvaux. [London: Stevens & Sons, Ltd. 1957. cxv and 1151 pp. £6 10s. net.]

When Mr. Colinvaux took over the editorship of *Carver* for the ninth edition he did a great deal of valuable recasting of the material and much rewriting in addition to the normal work of an editor. In my review of his work (see (1953) 16 M.L.R. p. 252) I gave a detailed account of what he had done and did my best to appraise the result; also to discuss the character and importance of *Carver* as a textbook on the law of affreightment. It is not necessary to go over this ground again.

A number of important decisions have been given since 1952 (the date of the ninth edition) the effect of which, on the existing law, is accurately stated by Mr. Colinvaux who has also added a number of earlier cases not previously cited in *Carver*—the total of new cases being no less than 240, which is certainly a guarantee of the editor's industry. In his Preface, Mr. Colinvaux tells us that he has largely rewritten no less than seven quite substantial portions of the work. In view of his earlier iconoclasm, I looked at these with some trepidation, since, while an occasional radical overhaul is welcome, indeed necessary if an old textbook is to retain its vitality, a large measure of stability is desirable between whiles, except, of course, when new decisions dictate otherwise. However, Mr. Colinvaux's bark is worse than his bite in this regard, for in the result there is but little alteration in the previous text.

What changes have been made occur chiefly in the chapter on the Hague Rules, the rewriting of which was the editor's outstanding contribution to the earlier edition and which he would naturally wish to improve here and there upon reflection. Actually, even here, the only substantial change is an important discussion on the construction of the expression "loss or damage" which occurs in several of the rules. Mr. Colinvaux was doubtless stimulated to discuss this matter by some of the new decisions above referred to, such as *Pyrene* v. *Scindia Navigation Co.* [1954] 2 Q.B. 402, the judgment of Devlin J. in which is one of the most valuable so far delivered upon the application of the Hague Rules, as is indeed evidenced by the fact that it is cited no less than seventeen times in this edition of *Carver*, and *Renton* v. *Palmyra Trading Corporation* [1957] A.C. 149. This discussion, which is essentially concerned with construction, is, for some unexplained reason, inserted in the text in advance of the section entitled "Construction of the Act." Some useful new notes have been added to Articles III and IV but otherwise the chapter remains much as before.

Mr. Colinvaux has also made some alterations to his chapter dealing with Conflict of Laws. I do not think these are an improvement. He omits the introductory paragraph which formerly explained how this matter comes to be so important and, indeed, difficult in connection with affreightment contracts, and substitutes two extracts from speeches by Lords Wright and Atkin explaining the basis on which conflict problems are settled. These are, of

course, authoritative, but they overlap a good deal. The elusive ship's flag rule has been restated, but I doubt if the amended version is any better than the old: the truth is that in recent times the judges have not applied this rule at all consistently. The present editors of *Scrutton* have found themselves in the same difficulty as Mr. Colinvaux.

The next section which is said to have been "largely rewritten" is that relating to dangerous cargoes, but so far as I can see only two small paragraphs have been added to an otherwise unaltered text. The problem of the dangerous berth has, of course, been acute of recent years owing to a divergence of views between English and Australian judges, which was resolved in *Reardon Smith Line* v. *Australian Wheat Board* [1956] A.C. 266, and this matter naturally called for some additions to the chapter on Discharge. *Alvion S.S. Corpn. of Panama* v. *Galban Lobo* [1955] 1 All E.R. 457 has also necessitated some slight additions to the section on demurrage under "weather working days." Finally, one may notice that the important changes in the law relating to actions *in rem* brought about by the Administration of Justice Act, 1956, passed to bring into operation international conventions in maritime law, has necessitated alteration of Chapter 21 which deals with the jurisdiction of the Admiralty Division in sea carriage.

In spite of his various additions to the text, Mr. Colinvaux has succeeded in reducing the size of the volume by about forty pages. This he has achieved —and he is to be congratulated upon it—by severely pruning the substantial section on stoppage in transit, a once important remedy of self-help, which, as he points out, the conditions of modern commerce have made "almost a dead letter."

It is hardly necessary to say, such is Mr. Colinvaux's reputation as a painstaking editor, that in addition to noting up the new decisions and citing so many old ones previously overlooked, he has incorporated the effect of the several recent statutes and statutory rules and orders. It is, perhaps, more important to notice that in future a cumulative supplement to this work will be published annually, while arrangements have been made for a quarterly commentary on current developments to appear in the *Journal of Business Law*. This is an interesting innovation which will be watched with interest. Some further improvement has been effected in the already admirable format of this work.

C.

Russell on Arbitration. Sixteenth Edition. By T. A. Blanco White and Anthony Walton. [London: Stevens & Sons, Ltd. £3 10s. net.]

When a monumental work has been through fifteen previous editions, a sixteenth edition calls for little commendation and less criticism. It is almost (as the advocate with no better argument is fond of saying) a case of *res ipsa loquitur*. This is the more so, since the five years which have intervened since the last edition of *Russell on Arbitration* was published, have seen no significant changes in the relative branch of the law. Continuity has, moreover, been ensured, in that the learned editor of the fifteenth edition, this time with able and painstaking assistance, has undertaken the task of improving on his own earlier work at the same time as bringing it up to date. A textbook which has been repeatedly worked over for more than a century by a succession of different hands, tends to become an old garment with new patches. Skilled fingers are required to apply the craft of invisible mending; and the exhaustion of the last edition during a period of comparative quiescence in the development of the law has afforded exactly the opportunity needed for that purpose.

Inevitably, there are some obvious and quite unimportant misprints scattered about the book, to which it would be churlish to draw particular attention. More

worth mentioning, perhaps, are the passages (at pages 27 and 32, 33) where the incidence of the Statute of Frauds is discussed without any reference to the effect of recent amending legislation. It is also tentatively suggested that the first word in the third line on page 110 should be "architect" and not "arbitrator."

The editors should also be congratulated on keeping bravely to the older practice of limiting footnotes substantially to mere references, instead of falling into the more modern vice (probably imported from abroad) of using them as a running commentary on the text—a habit calculated to bewilder and exasperate a reader seeking to study the text as a connected whole. Even this discipline, however, has a defect of its merits. Occasionally (as seems to be the case in the last paragraph on page 188, and in the paragraph headed "3. DECLARATION," on page 190) the text itself has become telescoped with some reference in a footnote, so that it is not clear how much of it consists of quotation and how much of editorial comment. But subject to these very minor criticisms, this latest edition of *Russell on Arbitration* maintains the position of that standard work as a challenger to all comers in its particular field.

Walter Raeburn.

Die Wechselprolongation nach schweizerischem, deutschem und österreichischem Recht. By Eduard Naegeli. [Zürich and St. Gallen: Polygraphischer Verlag. 1956. xxxi and 295 pp. (St. Galler Wirtschaftswissenschaftliche Forschungen Bd. 10). Sw. Fr. 28.20.]

This monograph deals very thoroughly with a set of problems which is not only of considerable importance in banking and finance, but has for long resulted in considerable legal difficulties. It is of high value, in particular, because it proves what can be achieved by a legal investigation in the field of economic science.

In Switzerland, Austria and Germany, as well as in England, U.S.A., France and Italy (see the detailed references at p. 33, note 49) there are three ways in which a bill may be renewed. There is the so-called simple renewal which merely restrains the creditor's remedy during a defined time. There is the so-called qualified renewal: by a note written on the document itself the day of payment is deferred. These two methods are often referred to as direct renewals. There is finally the so-called indirect renewal: on the day when the bill has matured a new bill is handed over which matures at a later date. The chief difference in practice between the three legal systems refers to the qualified renewal. This method, *i.e.*, the renewal by an alteration of the date of the bill itself, is no longer in use in Germany. In Switzerland practitioners favour this method notwithstanding the fact that the Swiss Bankers' Union, in 1937, advised against it and recommended instead the indirect renewal because of the greater certainty which resulted from the use of this method. In Austria the qualified renewal is not unknown, but has not found much favour with financial circles. The author shows that as compared to the simple renewal the qualified renewal creates a simpler and clearer legal situation. The qualified renewal is chiefly based on the rules of the law of bills of exchange, while the simple renewal is an ordinary civil-law contract. By painstakingly investigating and analysing economic needs and financial forms on the one hand and the special conceptions of the law of negotiable instruments on the other, the learned author succeeds in showing, convincingly, that the qualified renewal possesses some advantages which justify its continued existence notwithstanding the availability of the other two forms. It is significant that German reviews of the work have shown a more favourable attitude to the qualified renewal than

would correspond to the formerly prevailing view (see Rehfeld, *Juristenzeitung* 1957, p. 230, Hefermehl, *Neue Juristische Wochenschrift* 1957, p. 1023).

This, however, is only one of the points which the author has dealt with. He has, of course, treated at length all known problems of all types of renewals. He has laid the foundation for a statutory ruling which would constitute a most useful supplement to the Geneva Convention. A codification of the rules on renewal of bills of exchange would appear to be desirable because of the growing tendency to use bills of exchange for the purpose of financing medium term credits by way of recurrent renewals. The author's careful treatment of the problem of renewal—in particular because of the due attention paid to the economic and financial aspects of the matter—is, therefore, to be welcomed as filling a real need.

W. Müller-Freienfels.

Opinions of the Committees on Professional Ethics of the Association of the Bar of the City of New York and the New York County Lawyers' Association. [Columbia and Oxford University Press. Amen House, Warwick Square, London, E.C.4. 1957. 80s. net.]

This work is published under the auspices of the William Nelson Cromwell Foundation, one of whose objects is the "Cultivation of the highest standards of ethics, honour and conduct in the practice of law." In 1953 the Foundation sponsored the publication of *Legal Ethics* by Henry S. Drinker, which was the only comprehensive work on the subject of professional ethics written in the United States for a hundred years. Mr. Drinker referred more frequently in his book to opinions given by the Ethics Committees of the Association of the Bar of the City of New York and of the New York County Lawyers' Association than to those of any other State Bar Association. The New York Bar is the largest in the United States, and the New York courts handle more business than those of any other city in America, and perhaps in the world. It is consequently not surprising that the problems relating to legal ethics which confront the legal profession there are correspondingly numerous and of wide variety. These copious references by Mr. Drinker resulted in a flow of applications by his readers for access to the original opinions and this was a predominating factor in the decision of the Cromwell Trust to publish them.

The American Bar Association has laid down a number of canons or basic rules of conduct for the guidance of attorneys, and these canons have been adopted by many State Bar Associations including those for the City and County of New York. The 1,255 opinions set out in the book in question and answer form are in effect interpretations of these canons which are incidentally included.

No attempt is made to group the opinions according to subject-matter. They appear in order of date and cover the years 1912–1956. It will accordingly be appreciated that this book of 900 pages is not and does not pretend to be anything but a work of reference, but it includes an index of 36 pages which readily enables the reader to find opinions on any point he cares to select. Much of the field covered by the opinions is familiar to members of the legal profession in this country. It includes, for example, numerous replies to inquiries about the duty of an attorney to the court and to his client, solicitation of employment (unfair attraction of professional business), advertising, fees, retainers, engagement in business.

What may appear strange about some of the opinions is that they had to be given at all. For example, Canon 27 prohibits the solicitation of professional employment by advertisements. It can only be supposed that the attorney who asked:

"Is it professionally proper to insert in the *New York Law Journal* the following advertisement?:—

"Research Expert and Trial Counsel. Intricate problems of law solved. Procedure and technical advice given. Trials and Causes conducted from (a) to (z). Briefs and Memoranda on short notice. Moderate fee."

had not devoted much time to the study of the canons.

A feature about the opinions which will be surprising to English lawyers unfamiliar with legal administration in the United States is that they are directed to judges as well as to attorneys. To take one of numerous examples, the Bar Association of the City of New York is asked to pronounce on the propriety of a judge entertaining a petition presented on behalf of persons who are directors of a corporation of which the judge is also a director, and concerning the affairs of the corporation, and has no hesitation in replying in the negative.

At least one of the opinions could be of practical importance for English solicitors. It has been ruled, for example, that a New York attorney, having been in correspondence with a solicitor, ought not to attempt to settle a claim direct with the latter's client behind his back—but for the most part the book could provide much academic interest in the field of comparative professional ethics to the English practitioner who is prepared to pick it up at odd moments and study the pages at random.

W. W. Boulton

The Sale of Flats. By E. F. George, ll.b., Solicitor. [London: Sweet & Maxwell, Ltd. 1957. xvi and 71 (appendices) 122 and (index) 3 pp. 25s. net.]

This book is a well-written and easily read discussion of an unfamiliar aspect of the conveyancer's art. When dealing with flats one can be faced with nice problems—*e.g.*, what does the estate owner of a second-floor flat retain when the block is razed to the ground by fire?—and the average estate agent (who handles this type of transaction too often with an adaptation of the usual printed form) is not equipped adequately to face them; these are quite apart from the practical considerations of whether the disposition shall be effected by tenancy, lease or freehold sale.

In fact the whole question of flat sale has many aspects which are not purely the conveyancer's or even the lawyer's as such. Accordingly, this book deals not only with the form of contract and its completion and the form of the lease or conveyance, but with the merits of various conveyancing methods; not only with the provision of lifts and other services and the organisation of management, but also with the highly important questions of Income Tax and How to Finance the Development (viewed from the point of view of the developer as well as the prospective tenant).

The text proper is quite short (71 pp.) and the more substantial part of the work comprises a number of useful precedents appropriate for dealing with flats. Special mention should be made of the persons who have made additional contributions to this section: Mr. E. H. Scamell (whose name is misspelt in the index) and Messrs. J. A. R. Finlay and J. C. Hicks who have prepared precedents of schemes for the disposal of flats including the creation of a management company. Lastly, there is a fascinating little essay in an Appendix by Mr. C. Bernard Brown on the Economics of the Conversion of Old Dwellings, which gives a great deal of important advice to the intending developer, and interesting information for at least one onlooker, including the inside story of the highly successful conversion of the beautiful Georgian houses overlooking Blackheath.

H. R. Gray.

SERVITUDES. By C. G. HALL, Q.C., LL.D., Judge of Appeal in the Supreme Court of South Africa. [South Africa: Juta & Co., Ltd. 1957. 60s. net.]

THIS is the second edition of a book published under the joint authorship of the present editor and E. A. Kellaway in 1942. One must frankly say that the present edition like the first is a slipshod piece of work. Thus, the author says: "personal servitudes are usufruct, use and *habitatio* . . . and also personal rights to the enjoyment of praedial servitudes." There is no such thing as a personal right to the enjoyment of a praedial servitude and what is meant is presumably, as Innes C.J. said in *Willoughby's Consolidated Co., Ltd.* v. *Copthall Stores* (1913 A.D. at pp. 281–282), that "there are many instances in which South African courts have recognised as personal servitudes rights which, had they been attached to the ownership of other land, would have constituted personal servitudes." The controversy whether a servitude can consist *in faciendo* is inadequately treated and the discussion (p. 7) does not even mention what the accepted examples of such servitudes are nor why, as the author evidently thinks, they should not be generalised.

Of the cases decided in the fifteen years between the two editions some are incorporated in the text, others unaccountably omitted. Thus, the important decision on the right of lateral support in *East London Municipality* v. *S.A.R. & H.* (1951) 4 S.A. 466 (E.) is not mentioned. The question whether a personal servitude can survive the death of the *dominus* is answered differently in different passages (pp. 145, 159) and the author fails to distinguish between alienability and transmissibility. In short, *Servitudes* remains little more than a catalogue of some modern decisions.

A. M. HONORÉ.

Books and Publications Received:—

PITMAN'S COMMERCIAL LAW. By J. A. SLATER, B.A., LL.B. Fourteenth Edition by JOHN NEVIN, B.A. xviii and 284 pp. [London: Sir Isaac Pitman & Sons, Ltd. 1957. 12s. 6d. net.]

CONDUCT AND ETIQUETTE AT THE BAR. By W. W. BOULTON, B.A. Second Edition. vi. and 99 pp. [London: Butterworth & Co. (Publishers), Ltd. 1957. 10s. 6d. net.]

WHERE TO LOOK FOR YOUR LAW. Twelfth 1957 Edition by C.W. RINGROSE. 190 pp. [London: Sweet & Maxwell, Ltd. 7s. 6d. Interleaved Copy 15s. net.]

HANSON'S DEATH DUTIES. Tenth Edition. Second Cumulative Supplement (to January 1, 1958). By HENRY E. SMITH, LL.B., assisted by P. H. FLETCHER, LL.B. viii and 94 pp. [London: Sweet & Maxwell, Ltd. 10s. 6d. net.]

SUPPLEMENT TO GUIDE TO THE LAW OF TRUSTEE SAVINGS BANKS. Second Edition. By C. H. LAWTON, O.B.E., LL.D. 63 pp. The Savings Banks Institute, 35, Welbeck Street, London, W.1. 1957. 4s.

SPEED-UP LAW REFORM. By R. S. W. POLLARD. 36 pp. The Fabian Society, 11 Dartmouth St., London, S.W.1. 1958. 3s.

THE FUTURE OF LEGAL AID. By PETER BENENSON. 35 pp. The Fabian Society, 11 Dartmouth St., London, S.W.1. 1957. 3s.

CHARLESWORTH ON NEGLIGENCE. First Supplement to the Third Edition (to September 1, 1957). By J. CHARLESWORTH, LL.D. [London: Sweet & Maxwell, Ltd. 1957. 6s. 6d. net.]